

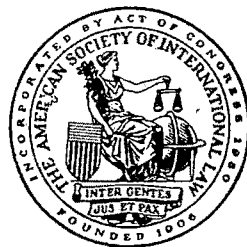
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JAN MAYEN IN PERSPECTIVE

*By Elliot L. Richardson**

On October 22, 1981, the Governments of Iceland and Norway approved an agreement for the joint management of the resources of the Jan Mayen continental shelf.¹ Incorporating the recommendations of a three-member conciliation commission, the Agreement obviated the need to draw a line demarcating the right to exploit the nonliving resources in the disputed area. The proliferation of boundary disputes during the intervening 7 years makes this an appropriate time to look at the potential benefits of using this approach in other maritime boundary disputes. After reviewing the stages in the resolution of the *Jan Mayen* dispute and the terms of the Agreement, this essay will discuss other situations in which the joint development approach has been used, the factors affecting its success and some examples of current delimitation disputes where this approach may be applicable.

I. THE JAN MAYEN FISHING AGREEMENT

The island of Jan Mayen lies 550 nautical miles from Tromsø, Norway, and 292 nautical miles from Iceland. At 53 kilometers in length and 15–20 kilometers in width, its total area covers 373 square kilometers. It is entirely volcanic in origin, the last eruption having been reported in 1970.

Now used only as a meteorological station, Jan Mayen has a year-round population of 30 to 40. It received very little attention until 1978 when Icelandic fishermen made a large catch of capelin off its shores. The sudden realization of the island's resource potential raised questions as to Jan Mayen's right to an exclusive economic zone (EEZ) and continental shelf, as contemplated for islands in provisions of the Law of the Sea Convention then being drafted.² Although Norway's title to Jan Mayen was established

* Of the District of Columbia Bar. The author served as Chairman of the Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen. He was assisted in the preparation of this article by Camille M. Antinori, now with the Strategic Analysis Division of the Department of Commerce.

¹ Agreement on the Continental Shelf between Iceland and Jan Mayen, *done* Oct. 22, 1981, Iceland-Norway, *reprinted in* 21 ILM 1222 (1982).

² United Nations Convention on the Law of the Sea, *reprinted in* UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983). The Convention was adopted on Apr. 30, 1982, and open for signature from Dec. 10, 1982, to Dec. 9, 1984, during which time it received 159 signatures. Currently, it has 34 of the 60 ratifications required to bring it into force. OCEANS POL'Y NEWS, September 1987, at 1. Article 121 provides that islands are entitled to a territorial sea, an economic zone and a continental shelf. *See* Iceland: Law No. 41 Concerning the Territorial Sea, the Economic Zone and the Continental Shelf, June 1, 1979, *reprinted in* 18 ILM 1504 (1979).

by a 1929 Act of the Norwegian Parliament,³ Norway did not claim a 200-mile fishing zone or EEZ around the island in 1977 when it established an EEZ adjacent to its mainland coast.

Following the 1978 capelin catch, Norwegian fishing interests persuaded their Government to repair this omission. Norway's action drew immediate objections from Iceland, and the two Governments entered into negotiations that were held in 1979 and 1980. These negotiations led to the Fishing Agreement of May 1980, which established a Joint Fisheries Commission charged with setting species catch quotas.⁴ The Agreement recognized that Iceland should have the full extent of its 200-mile EEZ between Jan Mayen and Iceland, while giving Jan Mayen an EEZ extending to 200 miles only where it is not constricted by Iceland's zone.⁵

There remained conflicting claims by the two Governments over the continental shelf surrounding the island. Invoking the theory of natural prolongation, Iceland asserted that the seabed between Iceland and Jan Mayen constituted part of the Icelandic continental shelf, while Norway insisted that it was an extension of Jan Mayen. The shelf area of prime interest to both parties was the part at the most exploitable depths, the Jan Mayen Ridge, a north-south trending feature marked by depressions and plateaus at water depths ranging from 200 meters to 1,600 meters.⁶ Because of these conflicting claims, Article 9 of the 1980 Fishing Agreement provided for the establishment of a conciliation commission to which delimitation of the continental shelf would be referred. The commission was directed to submit, within 5 months of its appointment, unanimous recommendations, taking into account a "broad scope of considerations," including Iceland's strong economic interest in the sea area, the existing geographical and geological factors, and other special circumstances. Although these recommendations would not be binding, the parties committed themselves to pay reasonable regard to them.⁷

II. THE CONCILIATION COMMISSION'S REPORT

The conciliation commission was formally established on August 16, 1980, with Ambassador Hans Andersen as conciliator for Iceland, Ambassador Jens Evensen as conciliator for Norway, and the author as Chairman. Since each of us was the head of our country's delegation to the Third

³ Law No. 2 Concerning Jan Mayen, Feb. 27, 1930, reprinted in I.C.5 MINISTRY OF FOREIGN AFFAIRS, NORWEGIAN LAWS AND ACTS, SELECTED FOR THE FOREIGN SERVICE (1980).

⁴ Agreement Concerning Fishery and Continental Shelf Questions, May 28, 1980 (entered into force June 1980), 1980 Overenskomst med fremmede stater 912. See Churchill, *Maritime Delimitation in the Jan Mayen Area*, 9 MARINE POL'Y 16 (1985).

⁵ Agreement Concerning Fishery and Continental Shelf Questions, *supra* note 4, preamble. See also Iceland: Law Concerning the Territorial Sea, the Economic Zone and the Continental Shelf, *supra* note 2.

⁶ Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen, Report and Recommendations to the Governments of Iceland and Norway (1981), reprinted in 20 ILM 797 (1981) [hereinafter Report].

⁷ Agreement Concerning Fishery and Continental Shelf Questions, *supra* note 4, Art. 9.

United Nations Conference on the Law of the Sea, we were aware that customary international law was far from completely crystallized with respect to the principles governing continental shelf delimitation between neighboring states. To avoid becoming mired in that issue, we decided instead to explore the feasibility of a special zone of joint exploration and development covering the most promising resource potential of the disputed area. If Iceland and Norway would consent to cooperate within that zone in accordance with a mutually agreed regime, the focus would be placed where it belonged: on a fair division of the resources at stake, rather than on the determination of an artificial line.⁸

The key to gaining acceptance for this approach, in the commission's view, would be a solid factual basis for its recommendations. Without adequate knowledge about the location, size, accessibility and likely presence of the area's potential resources, we could not convincingly justify and explain the terms and specifications of the proposed regime. It would not do, moreover, for experts in either country to be able to shoot holes into our findings.⁹

The commission's first meeting took place during a Law of the Sea Conference session in Geneva. Serving on the U.S. delegation at the time was Dr. Manik Talwani, Director of the Lamont-Doherty Geological Observatory at Columbia University. As it happened, Dr. Talwani was an expert on the geomorphology of the Jan Mayen continental shelf. He was also intimately familiar with the work of all the other scientists whose research had focused on the shelf. It might be mutually beneficial, he suggested, both to the commission and to the interested scientists, if the latter could be assembled at the Lamont-Doherty Geological Observatory for an exchange of information on their recent findings. The commission unanimously agreed that this would be a perfect opportunity to obtain the factual data that it recognized as essential.

Convened as a scientific advisory committee to the commission and chaired by Dr. Talwani, a group of nine scientists from the United States, the Federal Republic of Germany, France, Norway and Iceland met at the observatory from December 8 to 10, 1980.¹⁰ Their principal aims were:

⁸ An approach addressed to the realities underlying cooperation in solving delimitation disputes was anticipated by Judge Jessup. *North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.)*, 1969 ICJ REP. 3, 67-84 (Judgment of Feb. 20) (Jessup, J., sep. op.).

⁹ The value of having adequate knowledge of a disputed area is illustrated by the Danish-Swedish continental shelf dispute in the Kattegatt. Despite Swedish protests, a Danish company proceeded with exploratory drilling in 1983, only to find no commercially exploitable resources in the disputed zone. This discovery relaxed the political tension, although the delimitation is still pending. See Lagoni, *Interim Measures pending Maritime Delimitation Agreements*, 78 AJIL 345, 363-64 (1984).

¹⁰ In addition to Dr. Talwani, the members of the special scientific advisory committee were Dr. Karl Hinz (Bundesanstalt für Geowissenschaften und Rohstoffe, Federal Republic of Germany), Dr. Lucien Montadert (Institut français du Pétrole), Dr. Olav Eldholm (University of Oslo, Norway), Mr. E. Bergsager (Norwegian Petroleum Directorate), Dr. Gudmundur Palmason (National Energy Authority, Iceland), Dr. Lewis Alexander (Geographer of the United States), Dr. N. Terence Edgar (U.S. Geological Survey) and Mr. John Mutter, rapporteur (Lamont-Doherty Geological Observatory).

(1) to examine how the Jan Mayen Ridge, which is the most prominent feature in this region containing sedimentary rocks, is related morphologically and geologically to the island of Jan Mayen and Iceland; [and]

(2) to examine existing geological and geophysical data with a view towards obtaining the distribution of possible prospective areas for hydrocarbons in the region lying between Jan Mayen and eastern Iceland.¹¹

The scientific advisory committee based its conclusions on an examination of the origin and evolution of the Jan Mayen Ridge and on a bathymetric and lithologic mapping of the area. With regard to its first aim—the relationship between the Jan Mayen Ridge and the island of Jan Mayen and Iceland—the committee found the concept of natural prolongation to be inapplicable:

The concept of natural prolongation can be considered in two different senses, morphological and geological. Morphologically the northern part of Jan Mayen Ridge can be considered a southward extension from the shelf of Jan Mayen. On the other hand, Jan Mayen Ridge cannot morphologically be considered an extension from the Icelandic shelf.

However, geologically Jan Mayen Ridge is a microcontinent that predates both Jan Mayen and Iceland which are composed of younger volcanics; therefore the ridge is not considered a natural geological prolongation of either Jan Mayen or Iceland.¹²

With regard to the second aim—the ridge area's hydrocarbon potential—the committee was unenthusiastic but emphasized the need for further exploration:

The hydrocarbon potential of the northern part of the Jan Mayen Ridge . . . is regarded as more favorable mainly because it has a larger areal extent than the southern part. It should be stated that the southern part is less understood and appears to be more complex than the northern part.

. . . However, considered in comparison with known oil-producing areas worldwide, the overall potential cannot be considered good, based on the existing fragmentary data. We emphasize that detailed further exploration could change this assessment.¹³

Having armed itself with the best possible data, the commission reverted to its mandate: to draw on a "broad scope of considerations" in formulating its recommendations. As previously noted, it was also charged with taking into account "Iceland's strong economic interests in these sea areas, the existing geographical and geological factors and other special circumstances."¹⁴ Although acknowledging the numerous examples of state practice and court decisions developing the concept of natural prolongation in

¹¹ Report, *supra* note 6, at 806–07.

¹³ *Id.* at 818.

¹² *Id.* at 813–14.

¹⁴ *Id.* at 823.

the context of continental shelf delimitations, the commission followed its scientific advisory committee in finding these precedents inapplicable.¹⁵

Taking into account both the fact that Iceland had already been granted a 200-mile EEZ embracing a considerable area beyond the median line and the uncertainty as to the area's resource potential, the commission decided not to propose a demarcation line for the continental shelf different from the EEZ line. It gave special consideration to four other factors: (1) Iceland's total dependence on hydrocarbon imports; (2) the low hydrocarbon potential of the shelf around Iceland, placing it in a shelf-locked, disadvantaged status; (3) the fact that the Jan Mayen Ridge area was the only area between Jan Mayen and Iceland with any such potential; and (4) the inaccessibility of the resource due to the limitations of present technology and its distance from the market, which meant that only a large find would make it commercially exploitable.¹⁶

This was the route by which the commission came to its recommendation of a joint development zone "covering substantially all of the area offering any significant prospect of hydrocarbon production."¹⁷ The zone is a rectangular area covering 45,475 square kilometers and containing the most promising hydrocarbon potential. Iceland's EEZ overlaps the southwest corner of the rectangle by about 12,725 square kilometers. The remaining area north of Iceland's EEZ comprises about 32,750 square kilometers.¹⁸

The commission next decided that cooperation should begin at the pre-drilling stage, during which Norway would bear the cost of carrying out seismic surveys through the Norwegian Petroleum Directorate. Iceland and Norway would collaborate on the plans for such surveys, with Iceland participating through its equivalent of the Norwegian Directorate. If the results so justified, oil companies would be invited to buy the seismic surveys and to bid for exploration permits. Any resulting profits would be divided equally between the two countries.¹⁹

At this point, the commission had a variety of forms of joint cooperation agreements to consider in structuring the control of licensing should oil companies wish to bid for exploration and drilling rights. Such agreements differ from each other with respect to ownership of hydrocarbons and performance and control provisions, as well as in their approaches to funding and risk capital. The models considered included concession contracts with joint venture arrangements, service contracts, production-sharing contracts and entrepreneur contracts.²⁰ Since Norway's national petroleum company, Statoil, had extensive experience in concession contracts with joint venture arrangements, the commission selected this model.

During the development stage in the special zone, combined Icelandic-Norwegian participation would constitute at least 50 percent of a joint

¹⁵ *Id.* at 822, 824.

¹⁶ *Id.* at 826.

¹⁷ *Id.*

¹⁸ The area was defined by a series of coordinates as the zone between 70°35' and 68° north latitude, and 10°30' and 6°30' west longitude. Agreement on the Continental Shelf, *supra* note 1, 21 ILM at 1223.

¹⁹ Report, *supra* note 6, at 830-31.

²⁰ *Id.* at 832-34.

venture. Norwegian legislation would apply in the area north of the Icelandic EEZ boundary, and Icelandic legislation would apply in the area south of this boundary. Each country would have the option of participating in negotiations with private companies bidding in the other party's sector, of joining any joint venture group and of acquiring a fixed percentage interest of 25 percent or less if it so wished.²¹

The commission felt that at the early development stage when the risks were greatest, the financial burden should not be borne by the states but by private companies with deep-water experience.²² The states should therefore seek to have their share of the early drilling costs "carried" by the private companies until a commercial find was made, at which time the Governments would reimburse the oil companies. Recognizing that Iceland had less extensive experience in joint ventures than Norway, the commission recommended slightly different terms for each of the two sectors of the special zone. In Norway's sector, if the oil companies would not be willing to carry the Governments' share of exploration costs, Iceland would have the option of not joining the joint venture until a commercial find was made; if Iceland then decided to participate, it would reimburse Norway for its share of the costs incurred. In Iceland's sector, Norway would not have a corresponding right to withhold the decision to participate until a find was made.²³

Unitization procedures²⁴ would be implemented in all three areas holding the possibility of transboundary hydrocarbon deposits: (1) within the special zone across Iceland's EEZ boundary line, (2) across the special zone southward into Iceland's EEZ, and (3) across the zone northward on Norway's side. However, as a slight concession to Iceland, any transboundary deposit lying to the north on Norway's side would be considered as falling wholly within the special zone, which in effect would extend the zone into Norwegian jurisdiction.²⁵

III. OTHER APPLICATIONS OF THE JOINT MANAGEMENT APPROACH

The merit of a joint development zone, as opposed to a division of territory, lies in minimizing the potential for conflict, often by eliminating com-

²¹ *Id.* at 836-39.

²² *Id.* at 837.

²³ *Id.* at 838. In making these technical recommendations, the commission benefited from the special expertise of Ambassador Evensen, whose experience in the North Sea negotiations had familiarized him with the legal, scientific and commercial aspects of the methods of petroleum development.

²⁴ Unitization procedures usually allow each party to maintain jurisdiction on its side of the boundary line while the field is exploited as a single unit subject to well-defined installations and apportionment of reserves. The procedures are intended to promote good oil-well practice.

²⁵ Report, *supra* note 6, at 839. Although not immediately recommending them, the commission also suggested including in a future agreement other fields of cooperation such as transfer of technology, long-term petroleum supply agreements to Iceland, access to scientific and practical training, and other spheres of activity not involving resources. *Id.* at 840.

petition over the ownership of resources. Letting both countries have access to the resources of a disputed area on the basis of a mutually accepted regime sidesteps the thorny problems inherent in resolving the issue of delimitation, especially where the resources are unknown.²⁶ It converts the otherwise intractable issue of ownership into a question of distribution and of quantity: how much can each state be assured of obtaining from the disputed area? Joint development promotes international cooperation in the management of common resources, encourages their rational use and guards against the possibility of conflict over future discoveries in the border region. This approach to dispute resolution is more naturally arrived at by the more flexible method of negotiation between the parties than through a formal adjudicative process. It can thus take into consideration a wide range of political and economic interests that would not necessarily be relevant in a claim as of right.

The Jan Mayen Agreement well illustrates these advantages, but it is by no means the only example of the value of the joint development approach. The situations where it has been used can be divided into two basic categories: those involving already discovered common deposits and those involving common deposits that may be discovered in the future.²⁷ Depending on the particular legal and factual circumstances, degrees of cooperation can range from requiring only periodic consultation between countries on the changing status of a commercially productive common resource,²⁸ to arrangements in which an international body is charged with determining the overall management of the area concerned, as has been proposed for Antarctica and its continental shelf.²⁹

²⁶ Article IV of the Antarctic Treaty of 1959 is a prime example of sidestepping of the sovereignty question while research activities proceed. The Treaty establishes a regime for managing Antarctica but does not resolve the problems arising from the refusal of the United States, the USSR, Japan and others to recognize any territorial claims. Instead, Article IV simply freezes the parties' claims. Antarctic Treaty, *done* Dec. 1, 1959, 12 UST 794, TIAS No. 4780, 402 UNTS 71. A similar solution seems likely in the Antarctic mineral regime currently being negotiated. See *infra* note 29.

²⁷ See Onorato, *Apportionment of an International Common Petroleum Deposit*, 17 INT'L & COMP. L.Q. 85 (1968); Lagoni, *Oil and Gas Deposits Across National Frontiers*, 73 AJIL 215 (1979); Reid, *Petroleum Development in Areas of International Seabed Boundary Disputes: Means for Resolution*, 3 OIL & GAS: L. & TAX'N REV. 214 (1984/85).

²⁸ An example is the agreement between Austria and Czechoslovakia over the division of common gas fields lying in the Zwerndorf-Vysoká frontier area. See *Agreement Concerning the Working of Common Deposits of Natural Gas and Petroleum*, Jan. 23, 1960, Austria-Czechoslovakia, 495 UNTS 125. See also Lagoni, *supra* note 27, at 223.

²⁹ Since 1982, the parties to the 1959 Antarctic Treaty have been negotiating a legal regime that would govern the possibility of minerals development in Antarctica, including potential hydrocarbons on the surrounding continental margin. Although the draft regime is not a public document, a copy of its text has been published by Greenpeace. One of the most up-to-date descriptions of this proposed international management regime can be found in R. Tucker Scully's *The Antarctic Mineral Resource Negotiations: A Report* (paper presented at the 20th Annual Meeting of the Law of the Sea Institute, Miami, July 23, 1986). See also Joyner, *The Antarctic Minerals Negotiating Process*, 81 AJIL 888 (1987).

A comparison of the Jan Mayen Agreement with the United Kingdom-Norway Frigg Field Agreement of 1976³⁰ and the France-Spain Bay of Biscay Agreement of 1974³¹ points up the adaptability of joint arrangements to differing circumstances. In all three agreements the parties retain jurisdiction over the installations and operations on their side of a boundary demarcation. The Frigg Field Agreement, however, governs the activities in an already developed reservoir unitized and operated by a single "unit operator." It allows for changes in apportionment of resources between the two countries in accordance with periodic reassessments by the Frigg Field Consultative Commission. The Bay of Biscay Agreement was made in anticipation of future exploration and created a special rectangular zone of cooperation similar to the Jan Mayen special zone. A difference between the Jan Mayen Agreement and the Bay of Biscay Agreement is the provision in the latter for "equal sharing," under which each state is allowed to nominate companies for bidding rights whenever a permit is being granted by the state governing the other side of the dividing line. This provision also encourages applicants for the concession to enter into *accords d'association* with applicants nominated by the other state. Both states are thus on an equal footing even though the licensed area is under the management of one operator. This arrangement is, in fact, essentially similar to that called for by the Jan Mayen Agreement since equal rights to the resources of the special zone are afforded to both parties.³²

The success of the economic approach reflected in these agreements depends on the adaptability of the resource to a cooperative arrangement. Relevant factors are the nature of the resource, its significance to the concerned countries and the degree of benefit to be gained from coordinating their efforts. Jan Mayen's fishery resources are substantial and the fishing industry is much more important to Iceland than to Norway.³³ A joint fishing agreement between Iceland and Norway would thus be possible only if, like the Jan Mayen EEZ delimitation, it tilted heavily toward Iceland.

³⁰ Agreement Relating to the Exploitation of the Frigg Field Reservoir and the Transmission of Gas Therefrom to the United Kingdom, United Kingdom-Norway, May 10, 1976, 1977 Gr. Brit. T.S. No. 113 (Cmd. 7043).

³¹ Convention sur la délimitation des plateaux continentaux des deux Etats dans le golfe de Gascogne (golfe de Biscaye), Jan. 29, 1974, France-Spain, reprinted in 80 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 368 (1976). For additional agreements on maritime delimitation and fishing, see UN Doc. ST/LEG/SER.B/16, at 407 (1974).

³² Lagoni, *supra* note 27, at 223-26. Another kind of cooperative agreement is that of the Ems-Dollart Treaty between Holland and the Federal Republic of Germany, which encourages concessionaires in the Ems River Estuary, long claimed by both countries, to enter into joint operations on either side of the boundary. The Treaty also adopts the common approach for the exploration and exploitation of the area. Supplementary Agreement to the Treaty Concerning Arrangements for Cooperation in the Ems Estuary (Ems-Dollart Treaty), Apr. 8, 1960, Netherlands-Federal Republic of Germany, 509 UNTS 104.

³³ "Fifteen percent of Iceland's population is employed in the fishing industry, while the earnings of fisheries amount to some 17 percent of the gross national product. Of the country's total exports, fish products account for 75 percent, and of this 95 percent is caught in Icelandic waters." W. ØSTRENG, INTERNATIONAL EXPLOITATION OF 'NATIONAL' OCEAN MINERALS (Fridtjof Nansen Institute, Study No. R:007, 1983).

Although the discovery of oil in the Jan Mayen Ridge would also be more important to Iceland than to Norway, which already has North Sea oil, the low hydrocarbon potential of the disputed area relieved a certain amount of tension and eased the way for a cooperative regime.

Sharing a common Nordic heritage, moreover, undoubtedly helped to bring Iceland and Norway together and facilitated communication between them. Norway's interest in keeping Iceland within the NATO fold may also have reinforced Norway's conciliatory attitude.³⁴ Indeed, an element of interdependence may be a general indicator of the likelihood of success of a cooperative approach.³⁵ This is not to say that sharing similar politico-strategic objectives or economic ideologies is a prerequisite for cooperation. On the contrary, even though the economic and political ideologies of China and Japan diverge widely, they have been jointly developing the Bohai region of the Yellow Sea for several years.³⁶

Things can go wrong, of course, even where the circumstances favoring a joint management scheme seem propitious. Although joint management was the obvious and sensible way of resolving the boundary dispute between the United States and Canada in the Gulf of Maine, a 1979 fishing agreement signed by both countries was rejected by the Senate under pressure from the New England fishing lobby.³⁷ The two countries were thus obliged to submit the division of one of the most important fishing areas in the world to the International Court of Justice on the basis of complex and sometimes inconsistent or conflicting geological, geomorphological and ecological data.³⁸ The Court's delineation of a single maritime boundary was disappointing to the United States, which thereby lost access to part of Georges Bank, with the consequent disruption of the fishing patterns followed by New England fishermen for more than 300 years.³⁹ The outcome all too completely vindicated the position of Lloyd Cutler, the U.S. negotiator of the 1979 fishing agreement, who had argued:

³⁴ Østreng discusses the "Keflavik card" as a political factor influencing the formulation of the Norwegian negotiating standpoint *before* negotiations with Iceland actually took place. If tensions rose to the point where Iceland pulled out of NATO, as it had threatened to do in the "Cod Wars" with the United Kingdom, the United States would have been left without a base in the entire Norwegian Sea, which is of vital importance for surveillance of the Kola Peninsula. Nor could Norway have relocated the base on its territory. To do so would be in violation of its self-imposed military policy of "reassurance" for the Soviets, whereby Norway does not allow stationing of foreign troops on its soil during peacetime. Incidentally, the Norwegians mediated the "Cod Wars" dispute, which would have put them in an awkward position if they took a hard stance in the *Jan Mayen* dispute. *Id.* at 16-20.

³⁵ *Id.* at 31.

³⁶ *Id.*

³⁷ Agreement on East Coast Fishery Resources, Mar. 29, 1979, United States-Canada (not ratified by the United States). Linked to the Agreement was the Maritime Boundary Settlement Treaty with Canada, later ratified by both sides, calling for submission of the dispute to the International Court of Justice. Maritime Boundary Settlement Treaty, Mar. 29, 1979, United States-Canada, TIAS No. 10,204 (entered into force Nov. 20, 1981).

³⁸ *Clain, Gulf of Maine—A Disappointing First in the Delimitation of a Single Maritime Boundary*, 25 VA. J. INT'L L. 521 (1985).

³⁹ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 ICJ REP. 246 (Judgment of Oct. 12).

[I]f we had no fisheries agreement, and in an adjudication of the boundary the U.S. position was fully upheld, we would be under no obligation to allow Canada access to any of the fisheries resources of Georges Bank, and we could have a free hand in the management of those fisheries. On the other hand, what if the Canadian position prevailed? In that case U.S. fishermen would be barred from the north-eastern third of Georges Bank, an important area for scallops, cod, haddock and many other species. Moreover, because in that circumstance all the stocks on Georges Bank would be transboundary in nature, we would still have to manage the entire Georges Bank jointly with Canada. The Fishery Agreement provides insurance against the inherent risks of the boundary adjudication.⁴⁰

In his analysis of the *Gulf of Maine* case, an American commentator expressed the hope that "*The Gulf of Maine Case* will stand as an example of how *not* to proceed in a delimitation dispute, and that nations will follow the much wiser alternative chosen in *The Jan Mayen Case*."⁴¹

Where the strategic location of a region is even more significant than its natural resources, a system of joint jurisdiction within the disputed area is not likely to be acceptable to the parties. For example, a joint management approach is not likely in the Barents Sea between Norway and the Soviet Union because of its proximity to the home base of the Soviet Northern Fleet on the Kola Peninsula. Incidents of Soviet noncompliance with the provisional fisheries agreement of January 1978, generally known as the 'grey zone' agreement,⁴² also diminish the likelihood that the Norwegians would be willing partners with the Soviets in a zone of joint jurisdiction. Such incidents have included the boarding by Soviet patrols of fishing vessels operating under Norwegian licenses, in violation of the provisions of the agreement allowing third-party fishing in the grey zone. However, in militarily sensitive areas like the Barents Sea that are also prime fishing grounds, some degree of cooperation in fishing arrangements and conservation is almost unavoidable if continued activity is to be assured.

Where both strategic considerations and strained relations between the parties are involved, the lure of the resource has little chance of overcoming the obstacles to negotiation. Greece and Turkey, for example, have made several abortive attempts to negotiate the delimitation dispute involving the continental shelf in the Aegean Sea. At least for the time being, the long-standing friction between these two countries will continue to be an insuperable barrier to accommodating their common interest in exploiting the hydrocarbons believed to lie in parts of the disputed area.⁴³

⁴⁰ *United States-Canadian Fishing Agreements: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 40, 43 (1979) (statement of Lloyd N. Cutler), quoted in Clain, *supra* note 38, at 603.

⁴¹ Clain, *supra* note 38, at 605 (emphasis in original).

⁴² Østreng, *Regional Delimitation Arrangements in the Arctic Seas: Cases of Precedence?*, 10 MARINE POL'Y 132, 143 (1986).

⁴³ Greece unsuccessfully requested interim measures of protection and the Court held that it lacked jurisdiction to entertain the Greek Application. Aegean Sea Continental Shelf (Greece

The relations between the parties also affect one of the most important components of petroleum exploration and development: technological input, a commodity that is often guarded jealously by private companies and subject to strict export restrictions based on national security interests. The issue turns on the extent to which one party views the other as a competitor or threat to its national security. There are many joint ventures, of course, in which these factors do not get in the way. In some that involve states on an unequal footing with respect to technological expertise, the more developed country carries a greater burden. Australia and Indonesia, Saudi Arabia and Sudan, and Japan and China are a few examples.⁴⁴

Joint management zones can also be useful as a temporary solution to the delimitation problem. Article 83(3) of the Law of the Sea Convention provides that, pending an agreement on delimitation, "the States concerned, in a spirit of understanding and co-operation, shall make every effort" to reach a provisional arrangement without prejudice to the final agreement. This obligation to cooperate arises in the interval between the acknowledgment that a dispute exists and its final resolution.⁴⁵ While states may not always manage to establish interim arrangements, success in doing so allows resource exploitation to proceed peacefully and precludes one state from violating what may later prove to be the other state's territory or resources.⁴⁶ Interim arrangements can take an elementary form, such as the division of jurisdiction, or reach the level of some sort of joint management regime. In either case, the parties should be aware that the interim arrangement can have a "norm-creating" role. It follows that the terms they accept for such an arrangement should not deviate significantly from what they would deem acceptable on a permanent basis.⁴⁷

IV. POTENTIAL JOINT DEVELOPMENT ZONES

As previously noted, the indicators of the potential for a successful alternative to continental shelf delimitation are the adaptability of the resources

v. Turk.), 1976 ICJ REP. 3 (Interim Protection Order of Sept. 11); and Aegean Sea Continental Shelf (Greece v. Turk.), 1978 ICJ REP. 3 (Judgment of Dec. 19). The dispute has been going on since 1976. Turkey maintained that Greece had refused to participate in meaningful negotiations even to the extent of refusing to attempt to agree on the definition of the area in question. Observations of the Government of Turkey on the Request by the Government of Greece for Provisional Measures of Protection, 1976 ICJ Pleadings (Aegean Sea Continental Shelf) 69, 70, para. 10 (Observations submitted in 1976). See also Lagoni, *supra* note 9, at 355; THE MARITIME DIMENSION 184-85 (R. P. Barston & P. Birnie eds. 1980).

⁴⁴ W. ØSTRENG, *supra* note 33, at 31-32.

⁴⁵ "Considering the object and purpose of the obligation, one has to endorse the opinion that it must arise as soon as the claims overlap. Otherwise, one of the states concerned could prejudice the negotiations before they actually started." Lagoni, *supra* note 9, at 364. The obligation would remain if negotiations reached a deadlock or were discontinued, or if one of the parties issued notice that a dispute had arisen. *Id.*

⁴⁶ See generally *id.*

⁴⁷ North Sea Continental Shelf Cases, 1969 ICJ REP. at 42. See also W. ØSTRENG, *supra* note 33, at 137, 141-44.

to joint management, the likelihood of a cooperative relationship between the parties, and their willingness to balance control and share technology. These same considerations apply to other jurisdictional disputes for which joint management could be an advantageous solution. While there are many situations involving one or more of these indicators,⁴⁸ those in the Gulf of Paria, the Bering Sea, the Beaufort Sea and the Rockall-Faeroe plateau are useful examples of the potential for joint development zones.

The Gulf of Paria

Among the many common interests shared by Venezuela and Trinidad and Tobago are fishing, and, to a lesser extent, hydrocarbon exploration and development. The islands of Trinidad and Tobago are situated off the Venezuelan coast, and their EEZs overlap with Venezuela's. The St. Clair-Paria Pérez Treaty of 1942, better known as the Gulf of Paria Treaty,⁴⁹ concluded by Venezuela and the United Kingdom on behalf of Trinidad and Tobago, establishes the boundaries between the submarine areas of the gulf. According to Kaldone Nweihed, this Treaty has the distinction of being "the first contractual instrument in international law to enshrine the delimitation of submerged territory, anywhere in the world."⁵⁰ The EEZs and continental shelves of the two countries, however, go beyond the Gulf of Paria both to the northwest and southeast of Trinidad and Tobago. Trinidadians' fears that Venezuela's vigorous Caribbean policy might lead to a dominant political relationship strengthened their desire to reach an agreement on the areas not covered by the Gulf of Paria agreement.

The controversy that arose over poaching by Trinidadian fishermen in Venezuelan waters in the 1960s was often depicted in terms of a dispute between an "oil-rich neighbor and poor fishermen denied access to their means of subsistence."⁵¹ Trinidad and Tobago and Venezuela signed a fishing agreement on December 12, 1977, superseding the 1942 Treaty. This Agreement, after setting out formal expressions of friendship, solidarity and cooperation, established two common fishing areas to which fishing boats of either party have access. One area, the Northern Area, lies north of Trinidad and west of Tobago. The second area, the Southern Area, lies south of Trinidad and north of Venezuela. A Fishery Commission estab-

⁴⁸ Potential areas for the application of the joint development approach that are not discussed here are the Timor Gap between Australia and Indonesia, the Gulf of Thailand and the Gulf of Tonkin. See Valencia & Miyoshi, *Southeast Asian Seas: Joint Development of Hydrocarbons in Overlapping Claim Areas*, 16 OCEAN DEV. & INT'L L. 211 (1986). See also Dzurek, *Boundary and Resource Disputes in the South China Sea*, 5 OCEAN Y.B. 254 (1985); Park, *China and Maritime Jurisdiction: Some Boundary Issues*, 22 GER. Y.B. INT'L L. 119 (1979). Offshore industry in Africa is still in its early stages, and few delimitation agreements have, as yet, been concluded. The joint development approach may be useful in this region as the need arises in the future.

⁴⁹ Treaty Relating to the Submarine Areas of the Gulf of Paria, Feb. 26, 1942, United Kingdom-Venezuela, 205 LNTS 121.

⁵⁰ Nweihed, *EZ (Uneasy) Delimitation in the Semi-enclosed Caribbean Sea: Recent Agreements Between Venezuela and Her Neighbors*, 8 OCEAN DEV. & INT'L L. 1 (1980).

⁵¹ *Id.* at 16.

lished by the Agreement regulates specific conditions regarding the parties' fishing activities in the common areas, such as types of boats permitted, pricing of fish caught and percentage of the catch to be sold in Trinidad and Tobago. The Fishery Commission also has the power to present recommendations to the Governments of both parties concerning measures necessary for the proper management of resources in the common areas.⁵² The Fishing Agreement provides for the parties' cooperation in joint oceanographic and fishery enterprises, the protection of species, research and antipollution controls.

Negotiations for the permanent delimitation of the maritime areas extending from the Gulf of Paria into the Atlantic and the Caribbean continue to this day.⁵³ While only a partial solution to the delimitation dispute over the Caribbean areas is close to conclusion, it would still be advantageous to establish a joint development zone in areas with hydrocarbon potential.⁵⁴ The areas with hydrocarbon-bearing subsoil already contain operating oil wells and both countries have state-run oil industries, a circumstance that would facilitate the negotiation of a contractual arrangement. A joint development zone would appeal to Trinidad and Tobago because it would assure them of receiving technical assistance in petroleum development from Venezuela. For Venezuela, a joint development zone could bring political benefits in addition to economic returns: improved relations with its neighbors could be a byproduct of Venezuela's role as the leading contributor to the region's economic development.

The Bering Sea

Since 1981, the United States and the Soviet Union have been holding intermittent negotiations concerning the boundary in the Bering Sea set by the 1867 Convention Treaty on the Cession of Alaska. This maritime boundary, the longest in the world at over 1,800 nautical miles, crosses the highly promising hydrocarbon-bearing subsoil of the Navarin Basin, where the U.S. Minerals Management Service has conducted lease sales near the disputed zone. Geologically, the Navarin Basin extends into the eastern Siberian coast, making the discovery of a transboundary deposit very likely in the near future as this region is developed. Prior agreement on unitization procedures would be the first and most basic step toward eventual

⁵² Fishing Agreement, December 1977, Venezuela-Trinidad and Tobago, *Bilateral Treaties of Trinidad and Tobago* (1979), *Gazeta Oficial de la República de Venezuela*, June 7, 1978.

⁵³ Telephone interview with Andrés Aguilar Mawdsley, Permanent Representative of Venezuela to the United Nations (June 1986).

⁵⁴ A report of the Inter-American Dialogue refers to the principle of joint exploitation as particularly appropriate for the Caribbean: "Joint regimes—which would harmonize with a tradition of integration between political units [in the] region—could reduce costs, and might make it easier for outside countries and agencies to render technical assistance." *INTER-AMERICAN DIALOGUE, THE AMERICAS AT A CROSSROADS* 50 (Woodrow Wilson International Center for Scholars, 1983).

exploitation of the resource. The United States and the Soviet Union have a history of environmental cooperation in the Bering Sea region, which improves the prospect of cooperative management in fisheries, pollution and preservation of marine mammals.⁵⁵ Although restrictions on technology transfer would be an obstacle to joint petroleum development schemes, and the countries can hardly be considered mutually dependent, each Government has an interest in developing the resources and creating an example of peaceful coexistence on the basis of a mutually accepted regime.⁵⁶

The Beaufort Sea

The rich hydrocarbon potential of the Beaufort Sea has been known since the Prudhoe Bay discovery in 1968, but a dispute between the United States and Canada stemming from overlapping claims has stalled further exploration and production. The disputed zone covers part of the Diapir Basin; the United States has conducted lease sales but prohibited drilling there because of the dispute, and Canada has granted oil concessions nearby. The United States favors the principle of equidistance for the delimitation because it would allow the use of the convex U.S. coastline near the border to gain more continental shelf territory in the exploitable regions. Taking the sector-theory approach, Canada has called for a delimitation using the 141st west meridian running north in the direction of the pole.⁵⁷

The traditional mutual dependence of the economies and policies of the United States and Canada should make them ideal partners in a joint development scheme, and a negotiated agreement may remove some of the sting left by the *Gulf of Maine* dispute. However, reluctance by the United States to grant any credence to the sector-theory claim may limit willingness to compromise on the issue. A joint development zone would not only allow operations to proceed, but also free the United States from trying to explain why it uses the 1867 Convention line as a maritime boundary in the west with the Soviet Union but not in the east with Canada, where the Convention prescribes the 141st west meridian.⁵⁸ It might also set an interesting precedent for a United States-Soviet agreement in the Bering Sea. Negotiations with Canada are now being considered. In any case, unitization proce-

⁵⁵ Agreement on Cooperation in the Field of Environmental Protection, Dec. 4, 1972, United States-USSR, 23 UST 3544, TIAS No. 7512.

⁵⁶ Antinori, *The Bering Sea: A Maritime Delimitation Dispute Between the United States and the Soviet Union*, 18 OCEAN DEV. & INT'L L. 1 (1987).

⁵⁷ Note, *Delimiting Continental Shelf Boundaries in the Arctic: The United States-Canada Beaufort Sea Boundary*, 22 VA. J. INT'L L. 221, 243-44 (1981). There is a distinction, however: the U.S.-USSR delimitation pursuant to the 1867 Convention line was a maritime boundary covering the sea, while the U.S.-Canada line is described by the bilateral treaties as running "as far as the Frozen Ocean" ("jusqu'au" in the French version). *Id.* at 227-23.

⁵⁸ Russia's cession of its interest in Alaska to the United States in the 1867 treaty specifically provided for continued use of the 141st meridian boundary. Art. I, Cession of Alaska, Mar. 30, 1867, United States-Russia, 15 Stat. 539, TS No. 301, 11 Bevans 1216. See also Note, *supra* note 57, at 228.

dures and cooperation in pollution control, which has been a subject of controversy with Canada in the past, will be a necessity in this oil-rich region.

The Rockall-Faeroe Plateau

The Rockall-Faeroe plateau in the North Sea is one of a number of unexplored frontier areas with potential oil and gas deposits.⁵⁹ Since 1974, Britain, Denmark and Ireland have laid claims to the continental shelf surrounding Rockall on the basis that it forms a natural prolongation of their land territories. Rockall measures 80 by 100 feet at the base, has an approximate area of .000241 square miles, and is both uninhabited and uninhabitable, supporting only a light put there by Great Britain in 1972.⁶⁰ Such an excrescence, while above water at high tide, is vulnerable to definition as a "rock" under Article 121(3) of the Law of the Sea Convention, entitling it only to a 12-mile territorial sea; in that event, it would have no right to an EEZ or a continental shelf.⁶¹ British sovereignty over Rockall is undisputed. A tribunal has been established to settle the Irish and British continental shelf claims but not the Danish claim.⁶² Propositions based on the natural prolongation theory are tenuous for all three claimants because geological evidence does not readily establish that the plateau is linked to the European continent or to the Faeroe Islands.⁶³

Instead of establishing a tribunal aimed at a partial solution, Ireland, the United Kingdom and Denmark might agree to replace the bilateral tribunal with a commission like the Jan Mayen Commission. Such a commission could evaluate all three countries' claims and map out an area for joint exploitation where two or three of the countries' continental shelf claims overlap; it would not attribute to Rockall either an EEZ or a continental shelf. Such an agreement, while allowing Denmark and Ireland to share in the United Kingdom's superior oil and gas technology, would also benefit Anglo-Irish relations.

V. CONCLUSION

The strength of the Jan Mayen Agreement derives from the careful assessment of the parties' interests by the conciliation commission, its practical approach to surveying the disputed area, and its formulation of a framework for mutual cooperation. This and other joint management schemes, by

⁵⁹ *North Sea Oil*, ECONOMIST, Feb. 18, 1984, at 74 (U.S. ed.).

⁶⁰ Brown, *Rockall and the Limits of National Jurisdiction of the UK (Part 2)*, 2 MARINE POL'Y 275, 289 (1978).

⁶¹ See Law of the Sea Convention, *supra* note 2, Art. 121(3).

⁶² *Britain and Ireland; the other border*, ECONOMIST, July 5, 1980, at 62.

⁶³ There is substantial geological evidence that Rockall and the Faeroe Islands are linked by an unbroken extent of submerged continental crust, thus establishing a basis for a claim of natural prolongation. Brown, *supra* note 60, at 284.

creating flexibility for the adjustment of competing claims over resources, relegate the establishment of a jurisdictional boundary to a secondary position. The feasibility of such an approach in a particular maritime delimitation dispute can be assessed in the light of the unique aspects of that situation, among them the political relationship of the disputants, the resource potential involved, and each party's technological capability and expertise. At a time when quarrels over delimitation are proliferating as a result of the expansion of coastal states' maritime jurisdiction and increasing need for resources, the cooperative approach offers an alternative consistent with both the relevant principles of international law and the rational accommodation of the parties' political and economic interests. The Jan Mayen Agreement has features capable of constructive adaptation to the future resolution of other disputes.

WHICH LAW APPLIES TO THE AFGHAN CONFLICT?

By W. Michael Reisman and James Silk*

Soviet armed forces have been directly engaged in combat in Afghanistan for more than 8 years.¹ The level of international protest, sanctions and media coverage diminished after the initial outcry over the large-scale Soviet intervention in December 1979. With the conclusion in many diplomatic and professional quarters that the Soviet presence in Afghanistan would be of long duration, the focus of international disapproval shifted from the question whether the Soviet *presence* in Afghanistan was lawful or not to whether Soviet *conduct* in Afghanistan was lawful or not: from *jus ad bellum* to *jus in bello*.

Access to Afghanistan has been extremely limited, but various individuals, commissions and credible international organizations have reported extensive abuses of human rights by Soviet forces there; most of the reports are based largely on refugee testimony.² While the practices of the Soviet occupation and campaign have emerged with increasing clarity, the question of which law these practices are to be tested against is still controversial.

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¹ By the time this article is published, it is possible that the Soviet Union will, at least, have begun to withdraw its troops from Afghanistan. But even should the Soviet Union have begun its withdrawal, important legal and humanitarian issues arising from the conflict will continue to present themselves to the international community. The particular question we address here will not be rendered moot for a number of reasons. First, a Soviet withdrawal would require at least several months to complete. If the Geneva Conventions apply to the conflict that has torn Afghanistan since December 1979, they will continue to apply as long as Soviet troops remain involved in hostilities there. Second, even if all Soviet involvement in fighting ceases, at least part of the Conventions will apply as long as a situation of occupation continues. Finally, the resolution of the question of what law applies to the Afghan conflict has implications for the application of humanitarian law to similar situations.

² See, e.g., AMNESTY INTERNATIONAL, VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN THE DEMOCRATIC REPUBLIC OF AFGHANISTAN (1979); AMNESTY INTERNATIONAL, AFGHANISTAN: TORTURE OF POLITICAL PRISONERS (1986); AMNESTY INTERNATIONAL, 1980-1987 AMNESTY INTERNATIONAL REPORT (chapter on Afghanistan) (annual); HELSINKI WATCH, TEARS, BLOOD AND CRIES: HUMAN RIGHTS IN AFGHANISTAN SINCE THE INVASION, 1979-1984 (1984); HELSINKI WATCH/ASIA WATCH, TO DIE IN AFGHANISTAN (1985); HELSINKI WATCH/ASIA WATCH, TO WIN THE CHILDREN: AFGHANISTAN'S OTHER WAR (1986); INTERNATIONAL AFGHANISTAN-HEARING, FINAL REPORT (1984); Ermacora, Report on the situation of human rights in Afghanistan prepared in accordance with Commission on Human Rights resolution 1985/38, UN Doc. E/CN.4/1986/24; and Report of the Independent Counsel on International Human Rights on the Human Rights Situation in Afghanistan, 42 UN GAOR C.3 (Agenda Item 12), UN Doc. A/C.3/42/8 (1987).

An important issue is whether to apply the four Geneva Conventions of 1949 in their entirety,³ as well as the ensemble of customary and conventional law commonly known as the "law of The Hague," or only common Article 3 of the Geneva Conventions, which applies to "armed conflict not of an international character."⁴ The consequences of the resolution of this issue are hardly negligible. If the more detailed code were deemed to apply, much more of the behavior of all the parties to the conflict, some of which has been reported in the inquiries cited above, would become legally cognizable.

Though concerned with the appraisal of a particular conflict, the present inquiry is undertaken with the conviction that the policy issues it addresses are of major continuing importance. Analysis of the Afghan situation leads to conclusions that may have consequences for the application of humanitarian law to an increasingly important species of armed conflict, the full implications of which could not have been anticipated when the Geneva Conventions were drafted.

I.

The Geneva Conventions of August 12, 1949, provide in great detail for the protection of the diverse victims of war. Each Convention deals with a different category of victim. The third and fourth Conventions cover the treatment of prisoners of war and the protection of civilians in time of war.⁵ The four Conventions have several General Provisions in common, in particular, common provisions setting out the contingencies for their application.⁶ Common Article 2 establishes the criteria for the application of the Conventions to armed conflict. It states:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

³ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [hereinafter First Convention], Aug. 12, 1949, 6 UST 3114, TIAS No. 3362, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea [hereinafter Second Convention], Aug. 12, 1949, 6 UST 3217, TIAS No. 3363, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War [hereinafter Third Convention], Aug. 12, 1949, 6 UST 3316, TIAS No. 3364, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War [hereinafter Fourth Convention], Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287 [hereinafter Geneva Conventions].

⁴ Common Article 2 defines the applicability of the four Conventions. Common Article 3 sets forth the obligations of parties involved in noninternational conflicts. *Id.*

⁵ *Id.*

⁶ Common Article 1 states a general obligation: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." *Id.*

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.⁷

The first paragraph of Article 2 is the most straightforward, applying the Conventions to armed conflicts between states. While this includes what was, until World War II, thought of as "normal" war—i.e., declared war—it also includes "any other armed conflict" between states party to the Conventions, "even if the state of war is not recognized by one of them." This paragraph represents an advance over earlier conventions, which were more formalistic. As Jean Pictet states in his *Commentary on the Conventions*, "There is no need for a formal declaration of war, or for the recognition of a state of war, as preliminaries to the application of the Convention. The occurrence of *de facto* hostilities is sufficient."⁸ The application of Article 2(1) does not rest on judgments about the lawfulness of particular uses of force.⁹

The second paragraph of Article 2 "was intended to fill the gap left by paragraph 1."¹⁰ The whole of the Conventions is to be applied whenever all or part of the territory of a party is occupied, even when the occupation "meets with no armed resistance." The language is unqualified. Professor Schindler writes, "Whenever a State intervenes with its armed forces in another State, be it to alter the regime of that State or to exercise other acts of sovereign power, this is held to be an occupation within the meaning of Article 2(2)."¹¹ Pictet makes it clear that paragraph 2 was designed to protect the interests of protected persons in occupations achieved without hostilities when the government of the occupied country considered that armed resistance was useless. "It does not refer to cases in which territory is occupied during hostilities; in such cases the Convention will have been in force since the outbreak of hostilities or since the time war was declared."¹² Between them, then, paragraphs 1 and 2 of common Article 2 appear to

⁷ *Id.*

⁸ 3 THE GENEVA CONVENTIONS OF 12 AUGUST 1949. COMMENTARY 22-23 (J. Pictet ed. 1952-60) (4 vols., one on each Convention) [hereinafter Pictet].

⁹ In this regard, it is consistent with the view that "[a]ny use of force which can be attributed to a State according to the rules of State responsibility will result in the applicability of the laws of war under international law." Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 RECUEIL DES COURS 119, 131 (1979 II).

¹⁰ 4 Pictet, *supra* note 8, at 22.

¹¹ Schindler, *supra* note 9, at 132.

¹² 4 Pictet, *supra* note 8, at 21. Pictet adds:

The application of the Convention to territories which are occupied at a later date, in virtue of an armistice or a capitulation, does not follow from [paragraph 2], but from paragraph 1. An armistice suspends hostilities and a capitulation ends them, but neither ends the state of war, and any occupation carried out in wartime is covered by paragraph 1. It is, for that matter, when a country is defeated that the need for international protection is most felt.

Id. at 22.

apply the Conventions to all occupations in fact of one state party by the forces of another state.

Common Article 3 establishes a minimum set of protections that apparently apply to all other conflicts in which one party to the Conventions is engaged. Common Article 3 states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross (ICRC), may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.¹³

Common Article 3 represents an important regulation of so-called noninternational conflict but is far from the functional equivalent of the legal regime applied by common Article 2. Unlike the plenary Conventions, which contain more than three hundred substantive articles (excluding the common articles), Article 3 sets forth general obligations but explicitly forbids only the most flagrant violations of humanitarian norms. Some scholars have contended that, even if observed by the parties to a conflict, the safeguards of Article 3 allow those parties, subject to other international legal prohibitions, to engage in practices forbidden by the plenary Conven-

¹³ Geneva Conventions, *supra* note 3.

tions.¹⁴ Moreover, Article 3, unlike the plenary Conventions, does not mandate supervision by a neutral "Protecting Power" or an organization such as the International Committee of the Red Cross (ICRC).¹⁵ An impartial humanitarian body may offer its services to the parties, but they are under no obligation to accept the offer.¹⁶ Although the ICRC may invoke Article 3 when thus offering its services, the provision adds little to the ICRC's general claim of a power to intervene in internal disturbances.¹⁷ Pictet's conclusion seems quite balanced. He says, "It is true that [Article 3] merely provides for the application of the principles of the Convention and

¹⁴ A relatively extreme interpretation in this regard may be found in Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflict,"* 71 COLUM. L. REV. 37, 39-40 (1971). Farer cites examples of the inferior position of noncombatants under Article 3. For example, captured participants may not be tortured, but Article 3, according to him, does not prevent them from being executed for "treason." Also, if their punishment is limited to detention, the form of detention may, *pace* Farer, approach barbarity without manifestly violating established humanitarian law if the full protection of the third Convention does not apply. Without the protection of the Conventions, Farer says, civilians may be compelled by belligerents to serve in effect as slave labor. For discussion of other scholarly views on this issue, see *infra* note 17.

¹⁵ Article 8, common to all but the fourth Convention, provides:

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. . . . The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

First, Second and Third Conventions, *supra* note 3. See also Third Convention, Art. 126 (mandating permission for delegates of the protecting powers and the ICRC to visit places where prisoners of war are held and to interview prisoners without restriction on the duration and frequency of such visits); and Fourth Convention, Art. 143 (mandating permission for delegates of the protecting powers and the ICRC to visit all places where protected persons are and to interview such persons without restriction on the duration and frequency of such visits).

¹⁶ Farer, *supra* note 14, at 39.

¹⁷ Schindler, *supra* note 9, at 147. Others have identified a variety of deficiencies in common Article 3. See, e.g., Cassese, *A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict*, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 461, 492-93 (A. Cassese ed. 1979) (Article 3 covers only nonparticipants and persons who have laid down their arms; it does not regulate combat or protect civilians against the effects of hostilities. There are gaps in Article 3's humanitarian provisions. It does not define "noninternational armed conflict" or entrust to any international authority "the task of verifying whether or not a domestic disorder is in progress which should be deemed to fall under the purview of its provisions." The application of its provisions remains largely at the discretion of the parties to the conflict); Baxter, *Ius in Bello Interno: The Present and Future Law*, in LAW AND CIVIL WAR IN THE MODERN WORLD 518, 521-29 (J. N. Moore ed. 1974) (It is difficult to make distinctions between "armed conflict not of an international character" and other forms of domestic violence that may not rise to the level required for application of common Article 3. Whether or not Article 3 binds insurgents has been controversial. Its terms are so general that they cannot serve as an adequate guide to the conduct of belligerents); K. SUTER, AN INTERNATIONAL LAW OF GUERRILLA WARFARE 17 (1984) (Article 3's "lack of clear applicability to guerrilla warfare in general and guerrillas in particular" causes confusion); Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT'L & COMP. L. 253, 264 (1983) (The lack of "juridical precision" in the term "armed conflicts not of an international character" makes it difficult to apply Article 3).

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not for the application of specific provisions, but it defines those principles and in addition lays down certain imperative rules."¹⁸

The 1977 Protocols Additional to the Geneva Conventions left intact the distinction between international and noninternational conflicts in international humanitarian law, while narrowing appreciably the range of the second concept. Article 1(3) of Protocol I makes the Protocol applicable "in the situations referred to in Article 2 common to those [Geneva] Conventions." Protocol I also applies its provisions and the Conventions to what is commonly referred to as "wars of national liberation," a term of art referring to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination."¹⁹

Protocol II applies to noninternational conflicts, but not to all those covered by Article 3 of the Conventions. Article 1(1) applies Protocol II "to all armed conflicts which are not covered by Article 1 [of Protocol I]" but then imposes several additional conditions that make Protocol II apply to a narrower range of phenomena than does common Article 3 of the 1949 Conventions. Its application depends on the control of territory by the group opposing the established government and on that group's ability to apply the Protocol. Furthermore, it only applies to conflicts between the government and insurgents. Protocol II is to apply automatically if its requirements are met; it requires no declaration.²⁰ But important humanitarian activities of relief societies such as the ICRC are "subject to the consent of the High Contracting Party concerned."²¹ Perhaps most salient to the present inquiry is the fact that the relevant parties to the Afghan conflict have ratified the

¹⁸ 1 Pictet, *supra* note 8, at 48.

¹⁹ Art. 1, paras. 3 and 4, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter Protocol I], *opened for signature* Dec. 12, 1977, INTERNATIONAL COMMITTEE OF THE RED CROSS, PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 3 (1977), 16 ILM 1391 (1977). Schindler concludes that "these provisions have small chances ever to be applied." Schindler, *supra* note 9, at 144. He notes that the Protocol was really aimed at wars of liberation from European colonialism and that "alien occupation" has been interpreted to include only a few situations. *Id.* at 137-38. The Protocol can only come into effect if the authority representing the liberation effort issues a declaration invoking it and consenting to comply with applicable international law. Protocol I, *supra*, Art. 96. Even if the Afghan resistance were likely to issue such a declaration, it is doubtful whether it would be valid. The language of the Protocol suggests that only an authority with a certain degree of organization and discipline may be able to issue a declaration. Thus, a declaration would probably not be valid for a resistance that is actually composed of many liberation movements. *See* Schindler, *supra* note 9, at 140, 143. The fact that the various mujahidin groups control large amounts of territory and have coalesced with varying success may not meet the standard of Protocol I. Finally, during most of the conflict, the Soviet Union, its allies and the Afghan regime have viewed the opposition as composed of counterrevolutionaries seeking to undo the already successful national liberation that put the regime in power.

²⁰ Art. 1, para. 1, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter Protocol II], *opened for signature* Dec. 12, 1977, INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 19, at 89, 16 ILM 1442 (1977).

²¹ *Id.*, Art. 18(2).

1949 Geneva Conventions but not the Protocols Additional to the Conventions.

II.

The "distinction" between international wars and internal conflicts is no longer factually tenable or compatible with the thrust of humanitarian law, as the contemporary law of armed conflict has come to be known. One of the consequences of the nuclear stalemate is that most international conflict now takes the guise of internal conflict, much of it conducted covertly or at a level of low intensity. Paying lip service to the alleged distinction simply frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs.

This fact has long been appreciated.²² But eliminating the legal distinction has been impossible for obvious political reasons; a majority of states are unwilling either to subject what they consider their "internal" affairs to international scrutiny or to create an international regime that might grant recognition to current or future domestic rebel groups. In 1971 and 1972, the ICRC proposed applying the rules of international humanitarian law, or at least those on the treatment of prisoners of war and internees, to civil wars where foreign troops intervened. The suggestion was rejected by many government experts; they feared that it would encourage the parties in a

²² According to Cassese, the body of the law of war existing before the drafting of Protocols I and II, including the Geneva Conventions, has been "worn out by the 'new reality' of international and civil wars in the last few years. The new features of wars are well known." His list is extensive:

the multiplication of struggles of national liberation, which are still formally treated as "internal armed conflicts" . . . while the international community, through the pronouncements of the U.N. General Assembly, has for some time come to consider them international conflicts; the spread of previously unknown or little-used methods of warfare such as guerrilla warfare . . . and electronic or ecological warfare as well as the recourse to increasingly cruel and sophisticated weapons . . . ; the staggering increase in civil wars, often fomented from abroad or manipulated by great Powers; the ever-greater risks to which the civilian population . . . is exposed, both in international and in civil wars; the inefficiency of the existing machinery for supervising the implementation of the laws of warfare; and finally, the failure of States to bring to trial all those who so often violate the laws of war in the course of armed conflicts.

Cassese, *supra* note 17, at 461-62.

Schindler has also described the problems in distinguishing between international and non-international armed conflicts since 1949. The conception, under the Geneva Conventions, of wars of national liberation as noninternational has gradually changed since 1960. With the General Assembly's recognition of the right of self-determination for colonial peoples, the claim was put forward that wars of national liberation are to be considered international conflicts. Also, according to Schindler, there has been a large increase in noninternational armed conflicts "as a result of the growing number of States and of the instability of many regimes. Non-international conflicts are mostly carried out with greater cruelty than international ones." The "rudimentary rules" of common Article 3 have been inadequate to protect people in these conflicts. Foreign interventions in civil wars, which, Schindler notes, have increased, "show that non-international and international conflicts have increasingly mingled." Schindler, *supra* note 9, at 126-27.

See also Baxter, *supra* note 17, at 521-23; Draper, *supra* note 17, at 253-54.

civil war to seek foreign intervention so as to bring the Conventions into effect²³ or, in the case of insurgent groups, to enhance their legal status.²⁴ At the deliberations that produced the Protocols, an effort to abandon the distinction and to create a single law for international and internal conflicts was defeated.²⁵

As a result, two laws of war hover like brooding omnipresences over each conflict. The whole of the law of Geneva and the law of The Hague applies to conflicts between an established government and a state intervening on behalf of the opposition; it also applies to conflicts between states intervening on behalf of the opposing sides in a civil war. It applies as well to belligerent occupations. However, aside from those customary norms that are independent of conventional instruments, only the conventional regime of Article 3 and, perhaps, Protocol II, if and insofar as it is deemed to be customary international law, will apply to an armed conflict between a government and its opposition.²⁶ The relationship between the opposition and the forces of a state intervening on behalf of the established government creates a more ambiguous legal situation.²⁷

This latter problem must be addressed in determining which international humanitarian law applies to the conduct of Soviet forces and of Afghan resistance forces. We propose to examine in detail the facts of the conflict before assessing the application of Articles 2 and 3 to them. As will become clear, the facts of the intervention largely determine which of the alternative international legal regimes applies.

III.

The war in Afghanistan has never been either purely internal or purely international. Any determination is further complicated by the lack of neutral accounts of the conflict. Afghanistan is caught up in the politics of

²³ Schindler, *supra* note 9, at 150.

²⁴ Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U.L. REV. 145, 146 (1983).

²⁵ *Id.*

²⁶ See Schindler, *supra* note 9, at 150; and Gasser, *supra* note 24, at 147. For purposes of this discussion, the point is moot if Protocol II is not customary law, for Afghanistan is not party to the instrument.

²⁷ Schindler opines that only the rules for noninternational conflicts would apply because insurgents are not subjects of international law. Schindler, *supra* note 9, at 150. Schindler, in other work, has suggested the possibility of a different view. See *id.* n.35; and Schindler, *Die Anwendung der Genfer Rotkreuzabkommen seit 1949*, 22 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 75, 95 (1965). See also D. BINDSCHEDLER-ROBERT, A RECONSIDERATION OF THE LAW OF ARMED CONFLICTS 52-53 (1971); Wilhelm, *Problèmes relatifs à la protection de la personne humaine par le droit international dans les conflits armés ne présentant pas un caractère international*, 137 RECUEIL DES COURS 311, 356-59 (1972 III); Bothe, *Völkerrechtliche Aspekte des Angola-Konflikts*, 37 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 572, 590-92 (1977). The circularity here is lamentably characteristic of law. The relationship is not international because insurgents are allegedly not international subjects. They are not international subjects because the war is not international. Of course, the entire body of contemporary human rights law is premised on the susceptibility to international law of the relation between a government and its nationals.

East-West rivalry, and most reports of the conflict there rely, to a large degree, on sources with a clear preference for or tie to one side or the other in the larger rivalry. Accounts by the Soviets and the Afghan regime are very different factually from Western accounts. The former present a history that justifies or legitimates the Soviet intervention; the latter tend to establish the factual predicate for proving the illegality of the Soviet intervention. But the problem is not very different, or more daunting, than the ascertainment of the facts in any legal controversy. Indeed, there is substantial consensus on those key facts that are particularly pertinent to our inquiry.

The Soviet Union has played a significant role in Afghanistan for some time. Tsarist Russia had competed with Britain for influence in Afghanistan, particularly in the late 19th century. As early as 1919, the new Soviet Government sent material and technical aid to Afghanistan.²⁸ While Soviet influence diminished after 1929, Afghanistan benefited from trade with the Soviet Union, particularly in the 1920s and 1930s. After 1950, favorable trade agreements contributed to a rapid increase in trade with the Soviet Union.²⁹ When a 1953 coup brought Mohammad Daoud Khan to power in Afghanistan, its reliance on Soviet economic, technical and military aid increased rapidly.³⁰

Daoud resigned in 1963, and King Zahir Shah introduced a new constitution that became law on October 1, 1964. The country was governed under it for the next 10 years. Perhaps stimulated by talk of a new constitution, a variety of political groups became more active after 1963. In January 1965, a group of Marxists formed the People's Democratic Party of Afghanistan (PDPA). The new democracy underwent political polarization in the mid-1960s, with factions on the extreme left and right gaining strength. PDPA split into two main factions on the left while, on the right, Islam-inspired groups attracted support. Religious demonstrations against the trend toward secularism and student strikes over demands at Kabul University in 1970 were seen as signs of the Government's weakness. At the same time, the parties of the left were recruiting members and gaining strength.³¹

In July 1973, a coup put Prime Minister Daoud back in power. The presence among his backers of many who were associated with the two main

On a related issue, see the excellent study by Louise Doswald-Beck on the lawfulness of military intervention at the invitation of the government of the state into which troops are sent. Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189 (1985). She examines situations where the troops of one state enter another state to support a government that has lost or is in danger of losing control over the country. In particular, she analyzes the situation in Afghanistan, the reliance of the USSR on outside interference as its justification for intervening and other states' condemnation of the intervention as interference in the internal affairs of another country. *Id.* at 230-34.

²⁸ L. DUPREE, *AFGHANISTAN* 451 (2d printing 1978). For the history of Afghanistan up to the Saur Revolution, see generally *id.* at 430-666; J. COLLINS, *THE SOVIET INVASION* 8-45 (1986); A. HYMAN, *AFGHANISTAN UNDER SOVIET DOMINATION, 1964-83*, at 41-71 (1984); H. BRADSHER, *AFGHANISTAN AND THE SOVIET UNION* 13-73 (1985).

²⁹ L. DUPREE, *supra* note 28, at 493-94.

³⁰ A. HYMAN, *supra* note 28, at 28-30.

³¹ See generally *id.* at 54-60; L. DUPREE, *supra* note 28, at 559-658.

PDPA splinter parties, Parcham and Khalq, led to suspicion in the West that the coup was pro-Soviet. But Daoud soon replaced Khalqi and Parchami supporters. He also closed down the independent press, which led to the publication of underground, antigovernment leaflets by the left and the religious right. A crackdown on fundamentalist Muslim groups in 1974 sent a small number of fundamentalists into exile in Pakistan, from which, in the summer of 1975, they organized attacks inside Afghanistan.³² In 1977, Khalq and Parcham joined forces in response to their common disappointment with Daoud. A series of assassinations in late 1977 and early 1978 was indicative of the overall political instability of the country.³³ At the same time that Daoud was removing Khalq and Parcham members from positions of importance, Afghanistan was decreasing its dependence on the Soviet Union for foreign aid. In foreign policy, too, the Daoud Government was taking positions that were increasingly opposed to Soviet interests.³⁴

The arrests of left-wing leaders in April 1978 prompted a quick, bloody coup on April 27, styled the Saur Revolution, which was led by the PDPA. Daoud was killed, and Radio Kabul announced that power was in the hands of the Revolutionary Council of the Armed Forces. Insecure because of its lack of popular support, the PDPA regime was nevertheless determined to transform Afghanistan rapidly. Officials who sympathized with the old regime were reportedly pressured to resign and even tortured in efforts to identify enemies of the new regime.³⁵

From the beginning, three bitter rivals emerged as the dominant political figures in the new regime: Nur Mohammad Taraki, the President, and Hafizullah Amin, both Khalqi, and Babrak Karmal, a Parchami. The Khalqis, dominant in numbers and in the military, predominated and soon began to purge the Parcham leadership. The regime was also busy arresting other suspected enemies. By August, the Khalq party was completely in control, with all the key Parcham leaders exiled abroad as ambassadors. Karmal and the other Parcham leaders remained in Eastern Europe after they were dismissed as ambassadors there by the Afghan Government.³⁶

The Taraki regime pushed ahead with ambitious reforms in the countryside, but corruption, insensitivity to deep rural traditions and poorly

³² A. HYMAN, *supra* note 28, at 66-68.

³³ See *id.* at 61-71.

³⁴ A. ARNOLD, *AFGHANISTAN: THE SOVIET INVASION IN PERSPECTIVE* 62-66 (1985). Collins believes that Daoud's pursuit of a nonaligned foreign policy perhaps annoyed the Soviet Union and that the Soviets began in late 1976 to prepare for an eventual post-Daoud Afghanistan, but that "there is no substantive evidence that they began to plot his ouster." J. COLLINS, *supra* note 28, at 38-41.

³⁵ A. HYMAN, *supra* note 28, at 75-78. Collins evaluates the evidence and concludes that "there is no substantive proof that the Soviets planned, directed, or participated in the coup." He acknowledges that Soviet urging was important in the reunification of Khalq and Parcham. J. COLLINS, *supra* note 28, at 48-52.

³⁶ Hyman suggests that claims of Soviet management of the coup were inconsistent with the fighting between Khalq and Parcham and the widespread purges, which were of no benefit to the Soviet Union. Also, it was assumed that the Soviets preferred the Parcham faction to Khalq, which was considered more independently nationalist. Thus, the ascendancy of Khalq calls into question Soviet control of the Government in Kabul. A. HYMAN, *supra* note 28, at 81-85.

planned land reform offended rather than attracted the rural poor, who were instead recruited by local elites to oppose the regime with armed resistance. By the summer of 1979, resistance reached the level of civil war.³⁷ The kidnapping and killing of the U.S. ambassador in February 1979 embarrassed the regime and drew into question the Government's control over the country. An uprising in the western, conservative city of Herat in mid-March turned into a major crisis for the Government. Some soldiers joined the uprising, which was eventually put down by bombing and strafing from Russian-built planes, tanks and helicopters. Among the heavy casualties, estimated to be as many as 5,000, were several hundred Khalqi officials and army officers killed by the people and some 50 Soviet citizens, military advisers and their families, who were tortured and killed by the angry mobs.³⁸ The incident led to changes in the Government, and Amin emerged with greater powers. Despite attempts to restore confidence in the Government, stability continued to decline as localized armed resistance spread.³⁹

After the Saur Revolution, the number of Soviet advisers in Afghanistan increased quickly.⁴⁰ While Taraki denied dependence on the Soviet Union, Soviet advisers, particularly the ambassador, were thought to exercise a great deal of power. Yet it seemed that, by rejecting Soviet advice on moderating their political strategy, Taraki and Amin were asserting their independence from the Soviet Union. Nevertheless, the Soviet Union defended the regime, particularly with military aid against the growing resistance. Indeed, Soviet aid to the Khalq regime increased through 1979, and included training the Afghan secret police.⁴¹

The widespread terror, unrealized economic expectations among the poor, the introduction of a red flag and the painting red of buildings in Kabul, various insults to the Muslim faith, the personality cult of President Taraki, nepotism, the abuse of power to settle personal grudges and further personal ambition, and, most of all, the brutality of the regime increasingly alienated even those who initially sympathized with the revolution.

By the end of 1978, Peshawar, just across the border in Pakistan, had become a center of opposition activity. Attacks by Afghan fundamentalist groups from western Pakistan, as well as local resistance, were becoming

³⁷ See *id.* at 85-92; J. COLLINS, *supra* note 28, at 65.

³⁸ That only Soviet citizens were killed, while other Eastern Europeans were spared, is for Hyman evidence of the strong anti-Soviet feelings behind the uprising. "The growing dependence of the Taraki regime on Soviet advisers, arms and finances, when combined with the openly avowed sympathies of Khalq leaders for the 'Great Northern Neighbor' (as the Soviet Union was styled) had resulted in popular suspicion that Russian communists now ruled Afghanistan." A. HYMAN, *supra* note 28, at 99-101. See also H. BRADSHAW, *supra* note 28, at 101-02.

³⁹ A. HYMAN, *supra* note 28, at 101-05.

⁴⁰ According to Hyman, there were about 3,000 Soviet advisers working in the ministries, on civil projects and with the armed forces at the end of Daoud's regime. He estimates that about one-third of the estimated 4,500 Soviet advisers in Afghanistan by April 1979 were assigned to the armed forces. *Id.* at 105.

⁴¹ Hyman cites evidence that Soviet advisers were, at least, involved in brutal acts against real or imagined opponents of the regime in prisons and interrogation centers. *Id.* at 105-08.

more and more serious. Refugees from the border areas streamed into Pakistan, where camps were established and aid provided by the Pakistani Government. In one reported incident in a border village, Afghan soldiers, with Soviet advisers present, allegedly massacred most of the male inhabitants above the age of 12.⁴² As the fighting grew, more refugees fled to Pakistan, and more men joined in the fight against the regime.

By the summer of 1979, not only was rural resistance more successful than the Taraki regime had expected; Kabul was also "seething with resentment."⁴³ In June, a large organized demonstration was put down by heavily armed troops. In the aftermath, the level of repression increased. The following month, the regime rounded up suspected opponents, who later disappeared. The spreading guerrilla war was taxing the Government and sapping the morale of the army. The Soviet Union provided massive new amounts of military equipment, especially air power. But the growing Soviet presence through 1979 alienated many Afghan officers, even Khalqi. At the time of the Saur Revolution, Afghanistan had a conscript army of about 80,000,⁴⁴ but it was shrinking, and the draft of fresh conscripts could no longer be enforced.⁴⁵

Amin assumed greater power in July and tried to reverse the growing alienation of the army's officers and troops. An unsuccessful rebellion within the army and a rash of guerrilla attacks led in mid-September to Amin's taking over as the undisputed leader of the regime. Taraki and Amin escaped injury in a violent gunfight, but within weeks, in mysterious circumstances, Taraki was dead. It is thought that, despite expressions of confidence, the Soviet Union had serious doubts about Amin from the beginning.⁴⁶ But, apparently in return for improvements in his regime's policies toward the population, the Soviet Union continued its support. The country's dependence on the Soviet Union and the Soviet influence had not diminished. In fact, during the first months of the Amin regime, there was a buildup of Soviet forces in Afghanistan, and Soviet officers were involved in the Afghan army down to the company level. By the fall of 1979, the Government's reliance on Soviet military help had become even more pro-

⁴² Estimates of the number of the dead vary from 640, J. COLLINS, *supra* note 28, at 59-60, to 1,170, A. HYMAN, *supra* note 28, at 126.

⁴³ A. HYMAN, *supra* note 28, at 148.

⁴⁴ *Id.* at 147.

⁴⁵ See *id.* at 149-52; J. COLLINS, *supra* note 28, at 65.

⁴⁶ A. HYMAN, *supra* note 28, at 153-55. A correspondent in Karachi reported early in October that Russian exchanges with Amin indicated "grave doubts about Amin being able to stabilize the Afghan situation." The account went on, "According to informants with connections among the ruling Khalq party the Russians [a]re reported to have then given Amin 30 days to establish his authority throughout the land or make way for the Afghan extremists of the Parchamite party salted away in Eastern Europe, notably Karmal and Anita Ratziban." Daily Telegraph (London), Oct. 8, 1979, at 5, col. 3. A week later, an article with a Kabul dateline reported, "Diplomatic circles in Kabul were given the impression that Mr. Amin would either establish his authority within that time [30 days] or be replaced by the extremist Russian-backed Parchamites." *Id.*, Oct. 15, 1979, at 6, col. 6. Tensions between Amin and the Soviet Union were again reported early in November. *Id.*, Nov. 5, 1979, at 5, col. 1.

nounced, with Soviet pilots flying missions in jet fighters and helicopter gunships.⁴⁷

While Amin continued to show signs of wanting to move Afghanistan away from its dependence on the Soviet Union, it was already impossible. His regime was too unpopular, both within the country and among possible alternative foreign supporters, and the Soviets were exercising effective control over the Government. Some 1,500 Soviet officials were working in the civilian ministries, and between 3,500 and 4,000 Soviet officers and technicians were in the armed forces. An estimated half of the 8,000 officers and noncommissioned officers in the Afghan army at the time of the coup had been purged for political reasons by October 1979.⁴⁸

By September 1979, there were some 250,000 Afghan refugees in Pakistan and Iran. Amin's efforts at reconciliation were a failure. The war was still spreading and there was a wave of guerrilla attacks in Kabul itself.⁴⁹ By early December, the Soviet official media and government communications began to omit personal references to Amin.⁵⁰ On December 19, Amin moved with a force of trusted guards from the House of the People in the city to a palace outside Kabul. By this time, Soviet forces had been built up just across the border in the Soviet Union.⁵¹

⁴⁷ A. HYMAN, *supra* note 28, at 155-57. Early in November, the *Daily Telegraph* of London reported that 20 Soviet battalions had been rushed into Afghanistan to protect Afghan bases from Muslim rebels. The report suggested that the USSR had concluded that it was beyond Amin's capability to control the Muslim resistance. According to the same report, the Afghan army, once some 100,000 strong, was down to less than half that number, many troops having joined the Muslim rebels. *Daily Telegraph* (London), Nov. 3, 1979, at 6, col. 3.

⁴⁸ H. BRADSHER, *supra* note 28, at 123. Diplomatic sources, in mid-November, reported an increased infusion of Soviet arms and indicated that while the number of Soviet advisers had remained around 3,000, there had been a significant qualitative change. The Soviet Union had top political and military officials in advisory positions. One source said that there was evidence of Soviet organization and command of the military and that Russians were piloting aircraft, including helicopter gunships, and operating tanks. *The Times* (London), Nov. 17, 1979, at 7, col. 5. Estimates of the number of Soviet advisers in Afghanistan varied throughout this period. At the end of October, intelligence reports were cited estimating that there were 3,000 Soviet military specialists and 3,500 civilian advisers in Afghanistan. The same report noted that the Soviet Union had built a military complex in Afghanistan at Farah, some 65 miles from Iran, and enlarged an air base at Shindand. According to the report, the USSR had committed large sums to boosting the Afghan economy, had signed trade contracts worth £100 million and planned to supply the internal security forces with £3.3 million of equipment. *Daily Telegraph* (London), Oct. 31, 1979, at 4, col. 3. According to a *Times* article from Delhi, Amin had asked for outside help so he could cut his dependence on the Soviet Union. Pakistani President Zia ul-Haq told the reporter that Amin had approached his Government early in December with "frantic messages for an immediate meeting." Diplomatic sources in Kabul said that Amin had also approached the United States. *The Times* (London), Feb. 14, 1980, at 7, col. 6.

⁴⁹ A. HYMAN, *supra* note 28, at 157-58. By mid-December, Russian troops were said by Western sources to be defending key positions around Kabul. *The Times* (London), Dec. 19, 1979, at 7, col. 4.

⁵⁰ H. BRADSHER, *supra* note 28, at 124-25.

⁵¹ *Id.* at 178-79. U.S. government officials, several days after the coup, said that Amin had been too independent and had rejected the introduction of Soviet troops to fight the Afghan rebels. The officials stated that the United States first considered that an invasion was possible after the increase in the Soviet military presence on Dec. 8 and 9; a "special brigade" arrived at

On December 24, Soviet troops began landing at the Kabul airport and at other air bases in Afghanistan. The airlift of troops into Kabul continued until, by the morning of December 27, an estimated 5,000 Soviet soldiers were in the city.⁵² At the same time, Soviet troops and tanks were crossing into Afghanistan.⁵³ Meanwhile, Soviet advisers already in Afghanistan reportedly told their Afghan troops that an exercise was on and ordered them to turn in their ammunition for blanks; they also had batteries removed from tanks to be winterized.⁵⁴

On the evening of the 27th, Soviet troops attacked Amin's palace complex, where they encountered loyal Afghan troops.⁵⁵ During this fighting, a speech by Babrak Karmal declaring that he had been elected Prime Minister and that Amin had been executed was broadcast on the frequency of Radio Kabul. But Western intelligence evidence indicates that the speech was prerecorded and broadcast from a Soviet transmitter in Soviet Central Asia, overpowering the actual Radio Kabul signal, which continued its normal broadcast.⁵⁶ It is not clear exactly how Amin died, but accounts agree that

the Bagram air base, then moved to Salang Pass, the route of invasion from the Soviet Union, and secured it from rebel control. *N.Y. Times*, Jan. 2, 1980, at A14, col. 4.

⁵² A. HYMAN, *supra* note 28, at 159; H. BRADSHER, *supra* note 28, at 179. The massive airlift of Soviet troops into Kabul was reported in the West by Dec. 27. The U.S. Department of State said that the USSR had concentrated five divisions along the Afghan border and estimated that between 4,000 and 5,000 troops were in Afghanistan. People leaving from the Kabul airport on Dec. 26 reported seeing at least 12 Soviet transport planes land and unload armored vehicles and combat troops. *The Times* (London), Dec. 27, 1979, at 1, col. 3.

⁵³ A. HYMAN, *supra* note 28, at 159.

⁵⁴ H. BRADSHER, *supra* note 28, at 179-80; A. ARNOLD, *supra* note 34, at 93-95. The *Sunday Times* of London gave a similar account. According to an eyewitness report and a "highly-placed Afghan now in New Delhi," Amin was deceived during the final stages of the coup. The Soviets had advised him to move from the presidential palace downtown to the fortified Darulaman Palace 2 miles out to be "closer to 'protection' of the Soviet embassy." From there, Amin's contact with the Afghan army was tenuous. Then, Afghan officers guarding the radio station with 20 tanks were told by Russians that these tanks were being replaced with new Soviet models, but that since fuel was scarce, their diesel had to be transferred. Once the tanks were immobilized, the Afghans' radio transmitter was seized, and an attack launched on Darulaman Palace. *Sunday Times* (London), Jan. 6, 1980, at 17, col. 1.

⁵⁵ H. BRADSHER, *supra* note 28, at 180.

⁵⁶ *Id.*; A. HYMAN, *supra* note 28, at 165; A. ARNOLD, *supra* note 34, at 78; E. GIRARDET, *AFGHANISTAN: THE SOVIET WAR* 15 (1985). The first press reports of the coup relied on U.S. State Department sources. They cited eyewitness accounts of Soviet troops leading the assault on Kabul's radio station, fighting gun battles in armored personnel carriers in Kabul, fighting near the presidential palace and taking Afghan prisoners. Amin was reported executed on the 27th. Radio Kabul announced the sentence and execution of Amin and the election of Karmal as the new President and General Secretary of the People's Democratic Party. But the news account said that Tashkent Radio in the USSR, monitored by Reuters in Tehran, had broadcast a speech by Karmal. In another Radio Kabul broadcast monitored in Tehran, the Afghan Revolutionary Council was reported to have announced its support for Karmal. *Afghanistan President Executed after Soviet-backed Coup*, *The Times* (London), Dec. 28, 1979, at 1, col. 7. See also *Afghan President Is Ousted and Executed in Kabul Coup, Reportedly with Soviet Help—An Exile Takes Over*, *N.Y. Times*, Dec. 28, 1979, at A1, col. 6. No conclusions were drawn at that time about the whereabouts of Karmal, but the fact that his speech was only monitored on Radio Tashkent provided an early suggestion that something was amiss. A *New York Times* report from

he was dead by the end of the 27th.⁵⁷ Just after midnight, TASS, the Soviet news agency, broadcast a report that Karmal had spoken over Radio Kabul "on behalf of and on the instructions of" the PDPA Central Committee, the Revolutionary Council, and the Afghan Government, but did not explain how these instructions were given.

Only at 2:40 A.M. on December 28 did Radio Kabul broadcast an announcement that it said was from the Revolutionary Council's secretariat, naming Karmal council president and, thus, President of Afghanistan. That was followed by a broadcast demand for Soviet support, "including military aid," to defend Afghanistan and the Saur Revolution against continued aggression by foreign enemies. The announcement invoked the December 5 Treaty of Friendship.⁵⁸ A short time later, an announcement from "the

Islamabad on Dec. 29 said, "Diplomats here monitoring broadcasts from Radio Kabul and receiving information from embassies and other channels, were puzzled that Mr. Karmal had made no public appearances, even on television, since his takeover." The report then stated that the broadcast of Karmal's speech by Radio Tashkent several hours before it was first broadcast in Kabul suggested that it had been "taped, and rais[ed] the question of the whereabouts of Mr. Karmal, who is thought to have been in exile in Eastern Europe, under Soviet protection, for at least a year." *Id.*, Dec. 30, 1979, at A10, col. 3. On Jan. 1, the State Department said there was evidence of Soviet participation in the coup, including reliable indications that the initial radio reports were prerecorded tapes broadcast from the USSR. When those reports were being broadcast, the Department said, Radio Kabul was transmitting its normal programs. U.S. officials believed the reports were actually broadcast from the Soviet border city of Termez. *The Times* (London), Jan. 2, 1980, at 1, col. 1.

⁵⁷ A. HYMAN, *supra* note 28, at 169. The *Times* of London reported, however, that Soviet forces killed Amin: he had died in a small building near Darulaman Palace when six armored personnel carriers directed a "torrent of machine gun bullets" at the President's offices. "Popular—though not government—belief has it that Soviet troops fired the fatal rounds at the politically bankrupt dictator . . ." *The Times* (London), Jan. 18, 1980, at 14, col. 1. According to another report, "Afghan sources confirm that . . . Hafizullah Amin was killed in cold blood by the Russians on the night of December 27." *Sunday Times* (London), Jan. 20, 1980, at 1, col. 3. However, the Afghan Interior Minister, speaking at a news conference in January, made a statement that contradicted earlier announcements in both Kabul and Moscow that Amin had been killed shortly after the coup. "It appeared to fix Dec. 29 as the date when Mr. Amin was put to death." *N.Y. Times*, Jan. 22, 1980, at A10, col. 3.

⁵⁸ H. BRADSHER, *supra* note 28, at 181. Moscow radio announced the coup within hours, carrying extracts of Karmal's statement. In its first report, however, the *Times* of London said, "In spite of the unusually speedy announcement there is no evidence that the Soviet Union engineered the reported coup against President Amin, but it can only be pleased with his overthrow." *The Times* (London), Dec. 28, 1979, at 4, col. 3. The first mention of Karmal's speech in the *New York Times* came in an article that said the text of a speech by Karmal broadcast over Radio Kabul had been distributed in English, by TASS, the Soviet press agency. *N.Y. Times*, Dec. 28, 1979, at A13, col. 3. Bradsher's account seems to differ from the reports in the Western press on Dec. 28 that announcements by Radio Kabul of Amin's downfall and Karmal's election were monitored on the 27th. See *supra* note 56. The USSR justified its airlift of troops into Afghanistan by saying that it had responded to an urgent request for help from the Afghan Government. TASS said that, on the basis of the Treaty of Friendship, the new Government had "approached the Soviet Union with an insistent request for urgent political, moral and economic aid, including military aid." But in later versions of the statement, TASS added a phrase to this description of the request: "which the Government of the Democratic Republic of Afghanistan repeatedly requested from the Government of the Soviet Union

revolutionary tribunal," which was never further identified, said that Amin had been sentenced to death and executed. The Karmal regime and Soviet spokesmen have maintained that the action against Amin was carried out by Afghan forces, but Westerners in the city at the time said that Soviet soldiers alone were involved in the assault on the palace.⁵⁹ Although Karmal later put forward conflicting accounts, he is not known to have been in Kabul until his first public appearance there on January 1.⁶⁰

previously." This made the airlift seem less related to the coup. *The Times* (London), Dec. 29, 1979, at 1, col. 7. The TASS statements that the Afghan Government had requested aid in a Dec. 28 broadcast did not answer the questions already being asked about when and by what authorities the request was made since the Karmal Government came to power well after the airlift of Soviet troops began. *N.Y. Times*, Dec. 29, 1979, at A6, col. 6. In January, a Hungarian press agency dispatch from Kabul cited Karmal as having said that the Afghan Revolutionary Council had asked the USSR for help even before Amin was overthrown, but that Moscow had acted only when help was urgently needed. *N.Y. Times*, Jan. 11, 1980, at A6, col. 2.

In February, Karmal was quoted as having said, in an interview with the "pro-Moscow Indian newspaper Patriot," that Soviet troops had intervened 10 days before the coup. This was said to be the first admission that Soviet forces were in the country when Amin was overthrown. Karmal said that the PDPA had forced Amin to call for Soviet troops during the second week of December. *Id.*, Feb. 8, 1980, at A10, col. 1.

⁵⁹ H. BRADSHER, *supra* note 28, at 182. A Soviet statement in *Pravda* acknowledged that Soviet troops went to Afghanistan to help repel outside aggression, but denied that they had played any part in internal Afghan events. *N.Y. Times*, Dec. 31, 1979, at A1, col. 4. U.S. administration officials later said that elements of the Soviet airborne division that had landed at the Kabul airport on the 27th moved quickly across the city in armored vehicles and, after a brief, but violent, clash, wiped out the Afghan guard at Darulaman Palace, and captured and shot President Amin. *Id.*, *supra* note 51.

⁶⁰ Bradsher cites reports that Karmal arrived in a Soviet military plane at about 2:00 A.M. Dec. 28, which would have meant that he left Soviet Central Asia about the time Amin was killed. H. BRADSHER, *supra* note 28, at 186. Karmal later claimed to have secretly entered Afghanistan before the invasion and organized supporters within PDPA against Amin. According to Bradsher, Karmal gave several different versions of the time of this return—between August and mid-November and even later. *Id.* at 174. Karmal claimed that by the second week of December, an overwhelming majority of the PDPA Central Committee and the Revolutionary Council had successfully pressured Amin to request Soviet military assistance. Thus, Soviet troops entered Afghanistan beginning on Dec. 17 at the request of the Government. In Karmal's version, a majority of the Central Committee and Revolutionary Council had tried Amin, decided to execute him and elected Karmal to power before Dec. 27. Bradsher points out the inconsistencies in this and Soviet accounts of the request for troops and the election of Karmal. Among these inconsistencies was a Radio Kabul report on Dec. 28 that the PDPA Politburo had met and elected Karmal General Secretary and that the Revolutionary Council had elected him President that day. There was no mention, until much later, of Karmal's earlier secret election to the posts. *Id.* at 176. On Dec. 28, Radio Kabul said that the USSR had "acted in response to an official request from Afghanistan." The report on this broadcast pointed out that the Soviet buildup of troops preceded the new Afghan Government. It also said that Karmal had reportedly returned to Kabul during the week of the coup. *N.Y. Times*, Dec. 29, 1979, at A1, col. 3. At least one report at the time of the coup said that Karmal was believed to have returned to Kabul from Soviet Central Asia with other Afghan exiles among the Soviet troops airlifted into Afghanistan in the days before the action. *The Times* (London), Dec. 29, 1979, at 4, col. 1. *The New York Times* said that while President Karmal had not been seen in public by Dec. 31, he had been reliably reported to have met in private with some government supporters and at least one Eastern European ambassador. *N.Y.*

IV.

According to diplomats and to travelers who had driven to Pakistan, Kabul was, by December 31, "virtually a Soviet garrison town" with troops patrolling the streets. Soviet troops were also reported to have moved out of Kabul to take control of most of the rest of Afghanistan, and a force estimated at 15,000 by U.S. officials reportedly crossed into Afghanistan on December 29.⁶¹ The Afghan Air Force was said to be dominated by the Soviet Air Force, most combat aircraft being flown by Soviet pilots.⁶²

As the new year began, the Afghan Government appeared to be largely in Soviet hands.⁶³ By mid-January, the Soviet Union was reportedly in effective control of Afghanistan. The number of Soviet civilian advisers had increased dramatically since the coup, and they were said to be running the ministries.⁶⁴ Soviet troops had disarmed the Afghan army and then selec-

Times, Jan. 1, 1980, at A1, col. 2. U.S. officials stated that Karmal was flown to Kabul on Sunday, Dec. 30. *Id.*, *supra* note 51. The *Times* of London reported that Karmal made his first public appearance on Jan. 4. The *Times* (London), Jan. 5, 1980, at 4, col. 1. On Jan. 10, Soviet officials presented Karmal to foreign reporters. When asked why the Revolutionary Council, presided over by President Amin, would have called in Soviet troops if Amin was an American agent as Karmal had claimed, Karmal responded that the Revolutionary Council that requested Soviet help was the one over which he presided. N.Y. Times, Jan. 12, 1980, at A5, col. 1. (The article contended that Karmal was flown into Afghanistan by the Russians the day of the coup.)

⁶¹ The *Times* (London), Dec. 31, 1979, at 6, col. 5. President Carter received intelligence reports that an additional 15,000 to 20,000 Soviet troops, including an airborne division, had crossed into Afghanistan around Dec. 29, raising the total number of Soviet military personnel there to between 25,000 and 30,000. N.Y. Times, Dec. 30, 1979, at A1, col. 6.

⁶² The majority of some 160 combat aircraft in the Afghan armed forces was reportedly flown by Soviet pilots. There were also reports that at least two squadrons of fighters had been flown in to help combat the Afghan rebels. And all the M-24 helicopters being used against the rebels were flown by Soviet crews. All of the command, control and maintenance functions were reported to be in Soviet hands. N.Y. Times, Dec. 28, 1979, at A1, col. 5.

⁶³ A Western European diplomatic source said that Afghan functionaries at the Foreign Ministry were showing up for work, but not attempting to do anything. Other sources said the Ministries of the Interior and of Education were controlled by Russians. Soviet tanks were guarding Radio Kabul, and Soviet sentries were at the post and telegraph office and the Interior Ministry. The *Times* (London), Jan. 3, 1980, at 1, col. 7. Soviet troops were reported to have spread out all over Afghanistan, setting up encampments that "reportedly have an air of permanence. The Soviet forces are believed generally to be in control." Soviet forces had reportedly taken control of all civilian airports and the air bases at Kandahar and Shindand. N.Y. Times, Jan. 8, 1980, at A1, col. 3. A U.S. Defense Department analysis, though, said that the depleted Afghan army was doing most of the fighting, with Soviet troops largely in a supporting role; and that the USSR appeared to be giving top priority to rebuilding the Afghan army, which had been reduced from about 100,000 troops a year earlier to some 25,000. This account differed from the State Department's and from some press reports from the region, which indicated that Soviet forces were bearing the brunt of the combat. *Id.*, Jan. 9, 1980, at A5, col. 1.

⁶⁴ According to the *Sunday Times*, a senior Afghan government official said that a Soviet adviser had told him not to come to the office except to get paid and that the same thing was happening to "hundreds of my colleagues." An estimated 4,000 civilian advisers had been flown into Afghanistan since the Soviet troops had entered. The arriving advisers were not subjected to passport or customs checks. Each of Karmal's 19 ministers was reported to have at least two Russian advisers attached and ever present. The report said, "The Russians have

tively rearmed less than half of it. There were an estimated 70,000 Soviet troops in Afghanistan, supported by 1,750 tanks, 2,100 armored personnel carriers and two air divisions with 400 fighters, bombers and helicopters.⁶⁵ At the end of February, when martial law was declared, it reportedly gave effective government authority to the Soviet commander in Kabul.⁶⁶

From fewer than 10,000 before December 1979, the number of Soviet troops in Afghanistan climbed to an estimated 85,000 by March 1980.⁶⁷ By April, Karmal was said by some observers to have lost any grasp that he had on the Soviet army. Government sources in Afghanistan said he was a "virtual prisoner" of the Russians.⁶⁸ After mass desertions, the Afghan

taken over the policy-making and executive functions in most departments, though these are still notionally exercised by Afghan civil servants." The state security bureau KAM was reportedly dismantled and rebuilt around 640 Soviet intelligence officers. The report said that the Soviets were using the Afghan army as "cannon fodder" against the Muslim rebels. Sunday Times (London), *supra* note 57. See also N.Y. Times, Jan. 23, 1980, at A6, col. 1 (analysts said Soviet administrators, including many KGB officers, were directing the "reorganization of the government bureaucracy"). A report from Rawalpindi, Pakistan, said, "Journalists leaving Afghanistan, other travelers and diplomats here reading cablegrams from Kabul all say the Karmal Government shows no signs of actually functioning." Karmal was reported at a summer palace near Kabul under Soviet guard. Statements, relayed through Moscow, were issued on his behalf. N.Y. Times, Jan. 27, 1980, §1, at 12, col. 1. Afghans who managed to slip into Pakistan at the end of January said, "Russians give orders and Afghans follow them." At some government buildings, Afghans reportedly entered by one door, where they were searched, while Russians passed freely in and out through another. Russians were also said to write the news scripts for radio and television and to monitor Afghan broadcasts to be sure they were read correctly. N.Y. Times, Feb. 2, 1980, at A5, col. 1.

⁶⁵ Diplomats in Kabul estimated Soviet troop strength at 80,000 to 85,000, made up of an advisory group in command of Afghan army units, helicopter and jet fighter pilots, an airborne division and five motorized rifle divisions. At the same time, the Afghan army was said to be disintegrating, its numbers now estimated by Western military analysts as less than 40,000. N.Y. Times, Jan. 17, 1980, at A12, col. 1. Another report said that intelligence sources discounted press reports of between five and seven full Soviet divisions in Afghanistan and believed the total number of Soviet troops in Afghanistan to be about 50,000, with others mobilized just inside the Soviet Union. The Times (London), Jan. 18, 1980, at 14, col. 1. The U.S. Defense Department revised its estimate of Soviet troop strength down to 70,000 in February and estimated that another 30,000 were mobilized on the Soviet side of the border. The Times (London), Feb. 22, 1980, at 7, col. 3.

⁶⁶ "The decree imposing martial law on Friday in effect gave government authority to the Soviet commander in Kabul, and reports yesterday said he appeared to have taken over." N.Y. Times, Feb. 27, 1980, at A1, col. 3.

⁶⁷ J. COLLINS, *supra* note 28, at 79; STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 98TH CONG., 2D SESS., HIDDEN WAR: THE STRUGGLE FOR AFGHANISTAN 12 (Comm. Print 1984). The U.S. State Department said there were 85,000 Soviet troops in Afghanistan, another 35,000 along the border in the Soviet Union. The Times (London), Apr. 19, 1980, at 5, col. 8.

⁶⁸ The reporter, Chhotu Karadia, who had interviewed Karmal, said that, except for a dozen sentries at the main gate, the security of the People's House was in Russian hands. He said that Karmal's bodyguard, doctor and six chief advisers were Russians. He also cited such direct measures of Soviet control over the Afghan population as the replacement of English as the second language in schools with Russian, and of local television programs with Russian ones. Sunday Times (London), Apr. 20, 1980, at 1, col. 4.

army was reduced to fewer than 40,000 men by the end of May 1980.⁶⁹ Reports continued that Soviets were in control of most government departments. Furthermore, the Soviet Union was providing almost the entire food supply of Afghanistan and dominating the economy.⁷⁰

By early 1981, defections and casualties had reduced the Afghan army to an estimated 10,000 to 15,000 effective fighting troops.⁷¹ With forced conscription, the number was back up to as many as 50,000 by 1983, still far fewer than the 100,000 estimated to have made up the army prior to the invasion. But the morale of the remaining soldiers was low, men were fleeing the cities to avoid conscription, conscripts were deserting at rates of several thousand per month and many of the army's officers regularly collaborated with the resistance.⁷² In addition, by that time, more than 115,000 Soviet troops were in Afghanistan, and Soviet advisers ran the Afghan army.⁷³ Clearly, the bulk of the fighting against resistance groups,

⁶⁹ An increase was also noted in the number of dependents of Soviet military personnel brought into Afghanistan, as well as in the number of Soviet engineers engaged in large improvement and construction projects at military bases. *The Times* (London), May 29, 1980, at 1, col. 1. At the end of June, the *Times* defense correspondent estimated that the Afghan army had between 40,000 and 50,000 troops. *Id.*, June 27, 1980, at 8, col. 1. In September, their number was estimated to be 35,000, according to a diplomatic source in Delhi. They were described as a demoralized and unreliable force of questionable loyalty, whose capacity and morale were continuing to deteriorate. While they were poorly equipped, the Russian troops were supplied with new equipment and vehicles. Although Soviet troop strength was commonly estimated at more than 100,000, this source said it was between 80,000 and 85,000. However, the number of civilian advisers had increased and there were more than 1,000 civilian families in Kabul. According to this source, Soviet advisers held key positions in all the ministries and controlled telecommunications, and Soviet editors controlled Radio Kabul and the Farsi and English daily newspapers. *Id.*, Sept. 11, 1980, at 7, col. 1.

⁷⁰ According to a U.S. government analysis, Soviet officials occupied the senior positions in every Afghan ministry except the Foreign Ministry where they held the post of deputy director. All decisions were Soviet. The most Soviet-dominated ministry was said to be the Ministry of Information and Culture; virtually all information releases were produced by Soviet staff. A Soviet adviser assigned to the education system had begun preparing textbooks immediately after the December revolution. *The Times* (London), May 30, 1980, at 7, col. 7. Also, "a virtual blizzard of economic, trade, and technical assistance agreements" was said to be tying the Afghan economy tightly to that of the USSR and the Eastern European countries. "Afghan judges, lawyers, teachers, medical workers, scientists, and even truck drivers are being sent to the Soviet Union to absorb—and presumably bring back—Soviet systems, methods, and skills." *Christian Sci. Monitor*, Mar. 4, 1981, at 3, col. 1.

⁷¹ H. BRADSHER, *supra* note 28, at 282–83.

⁷² A. HYMAN, *supra* note 28, at 198–99, 213.

⁷³ H. BRADSHER, *supra* note 28, at 282–83. The Area Handbook Series report on Afghanistan says that estimates of Soviet troop strength in the mid-1980s ranged from 105,000 to 150,000, but were usually around 118,000. D. Seekins, *Government and Politics*, in R. NYROP & D. SEEKINS, *AFGHANISTAN, A COUNTRY STUDY* 209, 250 (Area Handbook Studies No. DA Pam 550–65, 1986). According to Hyman, Soviet forces in 1983 included many squadrons of warplanes and more than 400 helicopter gunships. Soviet military and civilian advisers conducted the war and the administration, all of which was financed by the Soviet Union. "So heavy was the Karmal government's dependence on the USSR that by any objective standards its very independence could be questioned." A. HYMAN, *supra* note 28, at 213. Hyman also

whose numbers have been estimated at about 100,000, has been carried out not by Afghan, but by Soviet, troops.

While resistance forces have controlled, or threatened to control, significant parts of the territory of Afghanistan, and Soviet forces have been content to hold the main towns, roads and military bases, one area is apparently under complete Soviet domination. By June of 1980, Soviet forces had sealed off the Wakhan corridor from Afghanistan, leaving it accessible only from Soviet Central Asia. The corridor, a long, narrow finger of land extending from the northeast corner of Afghanistan, between the Soviet Union and Pakistan, and touching China at its tip, was created in 1895 to separate tsarist Russia from Britain's Indian empire. By establishing Soviet garrisons at the two main passes into China and Pakistan, occupying the entrance to the corridor from Afghanistan, improving the road to the Soviet frontier and mining the passes from China and Pakistan to stop arms movements, the Soviet Union effectively cut the corridor off. The area's main inhabitants, the Kirghiz tribesmen, had already fled into Pakistan a year earlier. Most of the rest are members of the Ismaili minority, which has traditionally suffered at the hands of the dominant Sunni tribesmen of Afghanistan. They were reportedly passive after the 1978 coup, even welcoming the change.⁷⁴

By November, the official Pakistani news agency reported that the Soviet Union was in the process of annexing the Wakhan corridor, moving large numbers of troops into the area and improving its communication infrastructure.⁷⁵ Pakistan's President Zia stated publicly that the corridor was "now under the Soviet Union." It was reported in March 1981 that he had told an Indian journalist that an estimated 5,000 Soviet troops occupied the Wakhan.⁷⁶ The area was being administered directly by military authorities in the Soviet Union, rather than by the Soviet military command in Afghanistan, diplomatic sources said.⁷⁷

On June 16, 1981, the Soviet Union and Afghanistan signed a treaty formally delineating their border along the Wakhan corridor.⁷⁸ An Afghan resistance leader said that Karmal had agreed to a border adjustment in the Wakhan area when he visited Moscow in June 1981. According to the

notes the extent of Soviet economic assistance to Afghanistan, particularly citing projects which "have had the effect of integrating the Afghan economy into the Soviet Central Asian system." *Id.* at 207.

⁷⁴ *Russia amputates an Afghan finger*, *ECONOMIST*, Aug. 9, 1980, at 32, col. 1.

⁷⁵ *Christian Sci. Monitor*, Nov. 6, 1980, at 2, col. 2; *N.Y. Times*, Nov. 16, 1980, at A4, col. 4.

⁷⁶ While reports of the Soviet occupation of the Wakhan corridor had been coming from Pakistan since 1980, diplomatic sources said reliable confirmation had been received only more recently. *Christian Sci. Monitor*, *supra* note 70.

⁷⁷ There were reports that the Soviets had been building underground bunkers and permanent barracks, improving an east-west road to China and widening a north-south road leading to a pass on the Pakistan border. *Id.*

⁷⁸ *Fingerwork*, *ECONOMIST* (U.S. ed.), July 4, 1981, at 33, col. 2. This treaty has apparently not yet been submitted to the United Nations for registration and publication in the *UN Treaty Series*.

resistance leader, "the official Kabul radio had spoken of an 'annexation' of part of the Wakhan district." He also reported that Soviet Tadzhiks were being moved into the corridor to replace the local Afghan population, which had been relocated further west.⁷⁹ By late 1982, if not earlier, the Soviet Union had effectively annexed the Wakhan corridor.⁸⁰

V.

Despite the obviously substantial role of Soviet forces in the Afghan war, the question whether or not the conflict can be called international for purposes of applying international humanitarian law has not been resolved decisively. The ICRC offered its services to Afghanistan in 1979 and 1980. Before the events of December 1979, the ICRC had categorized the conflict as noninternational.⁸¹ In January 1980, Karmal received an ICRC delegation and assured the ICRC "that he would respect the principles of the Geneva Conventions under all circumstances and that all armed forces in Afghan territory would comply with their obligations under the Conventions."⁸² The ICRC was given authorization to assist political and "security" prisoners and prisoners of war. But in mid-June 1980, after some limited activities, the ICRC delegates were forced to leave Afghanistan.⁸³ The ICRC continued to seek permission to carry out its humanitarian activities, but, through 1986, its requests were rejected by the Afghan Government.

The ICRC also made appeals to the Soviet Union in 1980, pointing out "the responsibility, under international humanitarian law, of States whose armed forces participated in an armed conflict, even on the basis of a treaty or other agreements."⁸⁴ Later that year, a Soviet spokesman told an ICRC mission that humanitarian problems caused by the Afghan conflict did not concern the Soviet Union because its forces had not participated in any combat.⁸⁵ The ICRC also called regularly on the resistance groups to conform to the provisions of Article 3.⁸⁶ Appeals to the Afghan and Soviet Governments in 1981 were similarly rejected; the Afghan authorities stated that "the Geneva Conventions had no bearing on the situation in their country."⁸⁷

In April 1986, however, the Government of Afghanistan received an ICRC mission for talks on a proposed program of visits to detainees. In

⁷⁹ N.Y. Times, July 3, 1982, at A2, col. 3. Western intelligence analysts also reported such a population exchange. *Id.*, Dec. 26, 1983, at A8, col. 3.

⁸⁰ "Intelligence experts said this strip, called the Wakhan corridor, had in effect been annexed by the Soviet Union." *Id.*, Dec. 8, 1982, at A5, col. 1. After discussing the tenacious resistance the Soviet Union was encountering throughout Afghanistan, the *Washington Post* said, "An exception is the Wakhan corridor and Pamir region—the sparsely populated north-eastern panhandle that stretches to the Chinese border—which the Soviets have virtually annexed, according to diplomats and correspondents who have recently visited the area." *Wash. Post*, Oct. 21, 1983, at A1, col. 2, A14, col. 1.

⁸¹ Gasser, *supra* note 24, at 150.

⁸² 1980 ICRC ANN. REP. 47.

⁸³ *Id.* at 44–45.

⁸⁴ *Id.* at 45.

⁸⁵ *Id.*

⁸⁶ *Id.*, and following ICRC ANN. REPS.

⁸⁷ 1981 ICRC ANN. REP. 37.

August and September, the Government confirmed that it had agreed in principle to ICRC visits to people "captured bearing arms or arrested on account of the events."⁸⁸ In January 1987, the ICRC returned to Afghanistan and began establishing programs in Kabul to provide medical and orthopedic assistance to those wounded in the war and medical assistance to the civilian population. The Afghan Government also authorized the ICRC to visit all prisoners in Afghan prisons, in accordance with standard ICRC procedures, but a visit to Pul-I-Charki prison, begun in March, "had to be interrupted the same month, after completion of the first stage."⁸⁹ Negotiations were continuing for the resumption of ICRC prison visits.

The ICRC made no determination of the legal character of the conflict. Hans-Peter Gasser suggests that the new Government's consent to the Soviet presence "may have put an end to the conflict between those two countries."⁹⁰ We will examine below the immediate and longer term implications of these legal and factual conclusions. Gasser also recommends that the Afghan Government and Soviet forces fighting the insurgents "should be equally committed to respecting at least" common Article 3, pointing out that even a treaty that may make the Soviet intervention legal cannot affect the applicability of international humanitarian law to the armed conflict.⁹¹ But, Gasser writes, "In view of the opposing interests of the different parties to the conflict, it would be wishful thinking to postulate the application of the whole body of international humanitarian law to the relations between the intervening power and the insurgents."⁹² Gasser adds, though: "Nevertheless, humanitarian policy demands protection for all actual and potential victims of the conflict. Among the top priorities must be achieving greater respect for the civilian population, treating captured combatants similarly to prisoners of war, and guaranteeing respect for the protective emblem. This is precisely what the ICRC attempts."⁹³

The special rapporteur appointed in 1984 by the United Nations Commission on Human Rights to examine the human rights situation in Afghanistan, Felix Ermacora, considered the legal status of the conflict in his report of February 1985. Noting the extraordinary nature of the hostilities and the fact that the parties have not acceded to the Protocols, he concludes that the

⁸⁸ 1986 ICRC ANN. REP. 49-50.

⁸⁹ ICRC BULL., No. 142, November 1987.

⁹⁰ Gasser, *supra* note 24, at 151. Gasser points out that his article does not analyze what happens

when a new government is installed after the arrival of a foreign power. Suffice it to state that the government currently established in Kabul is the only government claiming to represent the country—there is no government in exile—and that the international community has recognized it de facto: it is represented in the United Nations.

id. at 151-52 n.15.

⁹¹ *Id.* at 152.

⁹² *Id.*

⁹³ *Id.* In our view, a conclusive characterization of the nature of the conflict and the law that applies is legally sound and consistent with the policy of contemporary international law. Specialized institutions with continuing responsibilities may sometimes find cogent reasons *not* to reach a conclusion on such a matter even when the facts warrant it, believing that the purposes of humanitarian law will better be served in some cases by a certain unclarity. For a particularly sensitive and candid examination of the issue, see *id.* at 157-59.

conflict is "one of a non-international character within the meaning of article 3 of the Geneva Conventions."⁹⁴ This is not, however, a conclusion that only Article 3 applies; the special rapporteur reiterates that it is difficult to conclude whether the conflict is international or noninternational, but that Afghanistan and the Soviet Union, as parties to the Geneva Conventions, are "*at least* bound by common article 3."⁹⁵ Whether or not the Conventions in their entirety apply thus remains an unanswered question for him. Ermacora notes violations of even the limited provisions of Article 3 and the inability of the opposition to ensure the application of international norms by its forces.⁹⁶

VI.

Scholars, writing as scholars, are entitled to reject factitious distinctions in legal instruments, but scholars, writing as jurists who seek to apply those instruments, must accept the terms as given. The terms "international" and "noninternational" conflicts import a bipartite method that attempts to provide only two factual reference points on a spectrum of possibilities. *Eo ipso*, they represent a decision that some conflicts, no matter how violent, will not be considered international. The method is not one that comports easily with the manifest policy of the contemporary law of armed conflict. That corpus of law seeks to introduce as many humanitarian restraints as possible into conflict, without judgments about its provenance or about the justice of either side's cause. In the contemporary context, the distinctions may vouchsafe incremental gains in the actual acceptance of humanitarian law. Yet, of central importance here, the bipartite factual approach may yield the conclusion that a conflict is not international and thus is insulated from the plenary application of the law of armed conflict—even though that particular conflict may be more violent, extensive and consumptive of life and value than an "international" one.

In our view, the armed conflict in Afghanistan is subject to the plenary application of the Geneva and Hague laws, by virtue of common Article 2, paragraph 1, or, alternatively, common Article 2, paragraph 2. Our review of the facts has persuaded us that the Government of the Democratic Republic of Afghanistan (DRA) after December 27, 1979, could no longer be deemed to be an independent government. The factual record indicates that the alleged invitation issued to the Soviet Union to enter Afghanistan did not emanate from the Government of Afghanistan at that time. On the contrary, it was issued within the Soviet Union by an Afghan who had no official position in the Government. On the basis of this "invitation," Soviet forces invaded Afghanistan, attacked the presidential palace, killed the President, and installed in his place the person who had "invited" them in the first place.⁹⁷

⁹⁴ Ermacora, *supra* note 2, at 42-43.

⁹⁵ *Id.* at 47 (emphasis added).

⁹⁶ *Id.* at 47-48.

⁹⁷ See section III *supra*.

To suggest that this sort of stratagem can transform an invasion by one state's military forces into the territory of another from an armed conflict into either an internal war or no war at all is to signal the end of a large part of the law of armed conflict. If concocted scenarios like this were to be taken at face value, any state could maintain a stable of political would-bes and has-beens of varying national pedigrees. At the appropriate time, one with the right nationality would be saddled and bridled and brought to the ring to issue the necessary "invitation." Once the armed forces of the foreign state had invaded his country, destroyed the existing government and put him in its place, the new leader, now clothed with authority, would then retroactively validate his government's "invitation."

Imagine the outcry, for example, if the United States were to claim that General Somoza had issued an invitation to U.S. troops from Managua, when he was actually broadcasting from Miami (or Ferdinand Marcos from Manila, when actually in Honolulu), and the United States then accepted the invitation by invading Nicaragua, killing Daniel Ortega, bringing Somoza back and keeping him in power with an enormous expeditionary force of U.S. troops involved in combat against Nicaraguans, all the while maintaining that the conflict was an internal one. This scenario would be absurd.⁹⁸ The initial outrage over the invasion itself would be followed by rejection of the U.S. "claim" that the conflict was internal. The analogy with Afghanistan, obviously, is imperfect, but it illustrates the predicament that designating such conflicts as "noninternational" leads to.

There is no way of excluding the operation of common Article 2, paragraph 1, together with the corpus of the Hague law, in the Afghan situation. No matter how the facts are viewed, forces of the Soviet Union entered Afghanistan and engaged in combat with loyal Afghan government forces, which brought about a change of government. The claim that the existing Amin Government invited Soviet troops to bring about its own downfall lacks any credibility. The Soviet Union quickly expanded its role in fighting the Afghan resistance forces until that role was not only predominant, but, in terms of administration and command, nearly complete. Thus, the situation in Afghanistan must be characterized as an armed conflict that became an occupation.⁹⁹ Pictet rejects the notion that the Conventions do not apply

⁹⁸ Such scenarios are further complicated when the "new" government is generally deemed to be competent to perform many international and intergovernmental functions, including, for example, holding a seat in organizations and maintaining embassies abroad. This kind of recognition, which is driven by the trend to recognize on de facto grounds, complicates further the status of insurgents under humanitarian law. We cannot consider these issues within the confines of this article. Their intractability is symptomatic of the unclarity of this part of international humanitarian law.

⁹⁹ Pictet makes it very clear that the transition from invasion to occupation has no effect on the application of the Conventions. They apply throughout. He says, "There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation." 4 Pictet, *supra* note 8, at 60. Pictet's discussion of this point is in regard to the Fourth Convention, *supra* note 3, Article 6, and the relations between the occupying power and civilians. Similar reasons, however, call for the continuity of the application of the plenary Conventions through the transition from invasion to occupation.

to an armed conflict in which both parties deny the existence of a state of war. "Even in that event it would not appear that they could, by tacit agreement, prevent the Conventions from applying. It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests."¹⁰⁰

Thus, where the forces of one state enter the territory of another, engage in hostilities, however limited, with the forces of that state's government and install a new, compliant government, an international conflict is constituted. When the outside forces transform their role into one of occupation, paragraph 1 of common Article 2 continues to operate according to its terms.

Common Article 2, paragraph 2 of the Conventions brings into operation the plenary law of war in cases of partial or total occupation of a contracting state's territory even if there is no resistance. The language used is mandatory ("the Convention shall also apply").¹⁰¹ If state A's military forces occupy part of the territory of state B without resistance from the government of state B, the situation would not fulfill the contingency of common Article 2, paragraph 1, because it is not a "declared war," or any other armed conflict, between two or more of the high contracting parties.¹⁰² As a result, the situation would not call into operation the plenary laws of war under Article 2, paragraph 1. But this situation would meet the requirement of common Article 2, paragraph 2, whose operation would achieve the same effect as the operation of paragraph 1.

If the claim is made that Soviet forces entered Afghanistan without resistance from Afghan government forces—discounting the factual accounts of the events in Kabul on December 27, 1979—and that there was therefore no armed conflict between two parties to the Convention, it would preclude operation of common Article 2, paragraph 1. But this rendition of the facts of the Soviet intervention would simply move the situation into the gap that paragraph 2 was designed to fill; the Conventions would still apply.¹⁰³

Even assuming that the DRA, throughout the period in question, has been an independent government, and even assuming that this independent government existed before December 24, 1979, and even assuming that, freely and entirely of its own accord, it invited Soviet forces into Afghanistan, the factual record confirms that parts of Afghanistan are under "partial or total occupation" by Soviet forces.¹⁰⁴ Adam Roberts has concluded: "The evidence from conventions, practice, judgments and writings all points unambiguously to the conclusion that the generic term 'military occupation' (or just 'occupation'), though by no means infinitely elastic, is a very broad one."¹⁰⁵ He also notes that the ICRC and the United Nations have often asserted that international humanitarian law is applicable to particular situations, "irrespective of the issue as to whether they count as

¹⁰⁰ *Id.* at 21.

¹⁰¹ See *supra* text accompanying note 7.

¹⁰² *Id.*

¹⁰³ See *supra* notes 10–12 and accompanying text.

¹⁰⁴ See section IV *supra*.

¹⁰⁵ Roberts, *What Is a Military Occupation?*, 55 BRIT. Y.B. INT'L. L. 249, 299 (1984).

international armed conflicts and/or occupations."¹⁰⁶ After a brief, but cogent, description of the Afghan situation,¹⁰⁷ Roberts concludes, "The international element in such conflicts appears to be so marked that the better developed body of international law governing international armed conflicts and occupations may well be viewed as applicable."¹⁰⁸ Roberts also notes the disadvantages of an approach that tends to limit the application of the law relating to occupations to cases of classic belligerent occupation. Most important for our purposes, such an approach "goes against a large body of practice and court opinion [and] would leave many activities of armed forces outside their own country in something of an international legal limbo."¹⁰⁹ These concerns are clearly relevant to the situation in Afghanistan. Under the circumstances, we believe, the four Geneva Conventions must apply to the conflict by virtue of common Article 2.

It is appalling to realize that the *lex lata* seems to view an invitation by a government to another government to occupy its territory against the wishes of the inhabitants as not triggering the plenary application of the Geneva Conventions, no matter what the resistance or deprivation of rights suffered. *De lege ferenda*, that factual situation should lead to the opposite legal conclusion. As Pictet noted in a different, but relevant, context: "[H]ere once more the interests at stake (namely, human lives), and the upholding of the principles on which civilization is based, are too important to be circumscribed by rigid rules."¹¹⁰ Textual arguments can be marshaled

¹⁰⁶ *Id.* at 302.

¹⁰⁷ Roberts writes:

Take, for example, a deeply divided and weak country, facing civil war. It has an unpopular government with a clear external ideological orientation, which invites in a sympathetic superpower ally. That ally then largely dominates indigenous political developments, and there are even allegations that it had complicity in the assassination of the embarrassingly unpopular head of the government which had invited it in. It also gets deeply involved in counter-insurgency operations against the regime's opponents. This is a rough approximation of the situation in Afghanistan since the Soviet intervention of December 1979.

Id. at 278.

¹⁰⁸ *Id.* Roberts identifies

some markers which may help to indicate the existence of an occupation, or may suggest the need for the law on occupations to be applied. These include: (i) there is a military force whose presence in a territory is not sanctioned or regulated by a valid agreement, or whose activities there involve an extensive range of contacts with the host society not adequately covered by the original agreement under which it intervened; (ii) the military force has either displaced the territory's ordinary system of public order and government, replacing it with its own command structure, or else has shown the clear physical ability to displace it; (iii) there is a difference of nationality and interest between the inhabitants on the one hand and the forces intervening and exercising power over them on the other, with the former not owing allegiance to the latter; (iv) within an overall framework of a breach of important parts of the national or international legal order, administration and the life of society have to continue on some legal basis, and there is a practical need for an emergency set of rules to reduce the dangers which can result from clashes between the military force and the inhabitants.

Id. at 300-01. The situation in Afghanistan is marked by each of these conditions.

¹⁰⁹ *Id.* at 304.

¹¹⁰ 1 Pictet, *supra* note 8, at 30.

and some cases may be brought into point, but the drafters of the Convention either rejected or intentionally overlooked this situation. However, this lacuna, while appropriate for high priority on the lawmaker's agenda, is not relevant to the Afghan case. There, as the record shows, the "invitation" was self-issued; the Government of Afghanistan did not extend it. Where a bona fide invitation *has* been extended, it violates reason and conscience to insist that the invitation legitimates the foreign occupation or makes it not an occupation, even when it ceases to have popular support or real indigenous governmental support, indeed even when the country rises in resistance.

The factual continuum that was adopted as the method for determining which of two laws applies to armed conflicts plainly contemplates the possibility of a noninternational conflict in which there will be participation, e.g., at the invitation of the local government, of the military forces of a third state. Presumably, such participation could include joint military operations, the use of military advisers sent by the foreign state and, possibly, independent exercises by the forces of the foreign state under the general direction of the local government. The calculus that emerges from Article 2 does not have a quantitative threshold beyond which the outside force becomes dominant, making an erstwhile noninternational conflict international.

We submit that where outside forces are in effective control of the conflict and have incorporated local forces into their own operations, the conflict has been factually internationalized. While the evidence in the Afghan conflict on this particular matter is not unequivocal, our study of the record leads us to conclude that Soviet generals have directed the operations of the Afghan armed forces, both land and air (insofar as Afghan forces are an effective element in the conflict), and not vice versa. Furthermore, the number of Soviet troops active in Afghanistan has, throughout, far outweighed the number of Afghan army troops. Finally, Soviet officials have been in effective control of, at least, the most important ministries of the Afghan Government.

CONCLUSION

We conclude that key facts of the Soviet intervention in Afghanistan do, indeed, make the conflict an international one according to the provisions of common Article 2 of the Conventions. Therefore, the Conventions in their entirety, together with the ensemble of law of armed conflict, are applicable for judging the conduct of the parties to the conflict.

First, Soviet forces invaded Afghanistan and removed the Amin Government from power. They were resisted by loyal Afghan government troops. The evidence that Karmal was in the Soviet Union at the time, that his broadcast originated in Soviet Central Asia, and that he only entered Afghanistan after Soviet troops were in control of Kabul and Amin dead belies the claim that the Soviet military was invited by the existing Government. Thus, it would appear that, from the time of the invasion, the conflict met

the criteria of the first paragraph of Article 2, applying the Conventions to conflicts between states. Even if the Afghan Government offered no resistance, neither did it offer a legitimate invitation. Thus, the Conventions would apply by virtue of the second paragraph of common Article 2.

Second, the Soviet participation in the conflict against the resistance absorbed the Afghan army's participation. All accounts of the increase in Soviet troop strength following the intervention in December 1979 and the parallel disintegration of the Afghan army, as well as the control of the army and civilian ministries by Soviet advisers, lead to one conclusion: the Soviet presence in Afghanistan, whether or not there was a bona fide invitation by the existing Afghan Government, has been an occupation of the territory of another state within the meaning of common Article 2. Again, the Conventions must apply.

ADVANCING THE FREEDOM OF RELIGION OR BELIEF THROUGH THE UN DECLARATION ON THE ELIMINATION OF RELIGIOUS INTOLERANCE AND DISCRIMINATION

By Donna J. Sullivan*

In 1981, 19 years after efforts to elaborate protections for religious freedom were formally begun in the United Nations,¹ the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (the Declaration) was adopted by consensus.² The long delay in achieving agreement on the text reflects well-known political struggles in the United Nations³ but may also be attributed in part to the

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¹ See GA Res. 1781, 17 UN GAOR Supp. (No. 17) at 33, UN Doc. A/5217 (1962), requesting that the Economic and Social Council (ECOSOC) prepare a draft declaration and a draft convention on the elimination of religious intolerance. The Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter Sub-Commission) had earlier appointed a special rapporteur, Arcot Krishnaswami, to study religious rights. His report presented an analysis of norms and state practice, A. KRISHNASWAMI, *STUDY OF DISCRIMINATION IN THE MATTER OF RELIGIOUS RIGHTS AND PRACTICES*, UN Doc. E/CN.4/Sub.2/200/Rev.1, UN Sales No. 60.XIV.2 (1960), and draft principles prepared by the Sub-Commission on the basis of the report. *Id.*, Ann. I [hereinafter Draft Principles].

² GA Res. 36/55, 36 UN GAOR Supp. (No. 51) at 171, UN Doc. A/36/51 (1981).

³ General Assembly Resolution 1781, *supra* note 1, was transmitted by ECOSOC to the Commission on Human Rights (hereinafter Commission) and the Sub-Commission. In 1964 the Sub-Commission transmitted a preliminary draft declaration to the Commission. See 37 UN ESCOR Supp. (No. 8), para. 294, UN Doc. E/3873 (1964) [hereinafter 1964 Sub-Commission Draft Declaration]. The working group formed in the Commission considered only 6 of the 14 articles in the Sub-Commission's draft. The Commission forwarded that draft, together with a modified text proposed by the working group, *id.*, para. 296 [hereinafter 1964 Commission Draft Declaration], to ECOSOC for referral to the General Assembly.

The General Assembly did not consider the preliminary drafts but asked ECOSOC to invite the Commission to begin work on a draft convention to be submitted to the Assembly together with the draft declaration. In 1965 the Sub-Commission presented a preliminary draft convention to the Commission, which the latter considered over the following two years. In 1967 ECOSOC transmitted the Commission's draft convention, consisting of a preamble and 12 articles on which the Commission had achieved agreement, to the General Assembly. For the text, see Note by the Secretary-General: Elimination of All Forms of Religious Intolerance, UN Doc. A/8330, Ann. III (1971) [hereinafter 1967 Draft Convention].

The General Assembly discussed the draft convention in 1967, but thereafter postponed consideration of the convention and decided in 1972 to accord priority to the completion of a draft declaration. GA Res. 3027, 27 UN GAOR Supp. (No. 30) at 72, UN Doc. A/8730 (1972). Work on the draft declaration progressed with difficulty in the Commission from 1974 until a text was adopted in 1981; it was transmitted by ECOSOC to the General Assembly in the same year.

For the history of the Declaration and the draft convention, see Liskofsky, *The UN Declaration on the Elimination of Religious Intolerance and Discrimination: Historical and Legal Perspectives*,

potential for controversy inherent in the subject matter itself. Against the historical backdrop of civil strife, international warfare and ideological conflict fueled by religion, the Declaration stands as a milestone in the progressive development of human rights norms.

Although it lacks, of course, the nature of an international agreement, the Declaration is "regarded throughout the world as articulating the fundamental rights of freedom of religion and belief."⁴ The Declaration gives specific content to the general statements of the rights to freedom of religion or belief and freedom from discrimination based on religion or belief contained in the major human rights instruments. Because it is enunciated in normative terms, elevating the rights and freedoms in question to normative status, the Declaration has a certain legal effect, "under the criteria deriving from international legal decisions."⁵ That the United Nations General Assembly intended that it be normative and not merely hortatory is apparent from its Articles 4 and 7. Under Article 4, states are required to "make all efforts to enact or rescind legislation" and to take other effective measures to prohibit discrimination on the basis of religion or belief.⁶ Article 7 imposes a more categorical obligation, by providing that "[t]he rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice." There is no consensus on whether the prohibition of discrimination on grounds of religion or belief already constitutes a norm of customary law.⁷ As the Declaration acquires

IN RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER 41, 460-63 (J. Wood ed. 1985); Lerner, *Toward a Draft Declaration Against Religious Intolerance and Discrimination*, 11 ISR. Y.B. HUM. RTS. 82 (1981); M. MCDUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 677-84 (1980); Clark, *The United Nations and Religious Freedom*, 11 N.Y.U. J. INT'L L. & POL. 197 (1978); Claydon, *The Treaty Protection of Religious Rights: U.N. Draft Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 12 SANTA CLARA LAW. 403 (1972). See generally Lerner, *The Final Text of the U.N. Declaration Against Intolerance and Discrimination Based on Religion or Belief*, 12 ISR. Y.B. HUM. RTS. 185 (1982).

⁴ UN Doc. E/CN.4/1988/44/Add.2, at 1 (statement by the United States Government). See also UN Doc. E/CN.4/Sub.2/1987/26, at 48-49 (asserting that declarations adopted by the General Assembly imply "obligations of conduct" and contain "values" governing conduct that cannot be taken away by political action, although they do not give rise to "rights" from a strict legal standpoint).

⁵ UN Doc. E/CN.4/AC.39/1988/L.2, at 5 (analytical compilation of views regarding the significance of the Declaration on the Right to Development, prepared by the Secretary-General).

⁶ Article 4 of the Declaration states:

1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, political, social and cultural life.

2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.

⁷ Section 702 of the *Restatement (Third) of Foreign Relations Law of the United States* (1938) does not include religious discrimination among the customary norms that it lists. See, however,

concrete material content through its implementation, it will contribute to the acceptance of the customary law status of this important principle.

The recent creation of implementing mechanisms in the United Nations has intensified the need for careful analysis of the Declaration. In 1986 the Commission on Human Rights entrusted a special rapporteur, Angelo d'Almeida Ribeiro, with the task of examining incidents of religious intolerance and discrimination, reporting on compliance with the standards stated in the Declaration and recommending remedial measures.⁸ Following a review of Ribeiro's first report, which revealed the frequency and gravity of violations of religious freedom, the Commission extended his mandate.⁹ The special rapporteur's second report, submitted in 1988, focused on the role of governments in violations of the Declaration; Ribeiro concluded that the broad geographic distribution of the allegations of violations he had received "highlight[ed] the nearly universal nature of the problem of intolerance and discrimination based on religion or belief."¹⁰

In addition, the Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a special rapporteur, Elizabeth Odio Benito, to report on the causes and current dimensions of religious intolerance and discrimination on grounds of religion or belief and to propose remedial measures.¹¹ Both of the special rapporteurs have recommended reopening the question of drafting a convention on this subject,¹² an undertaking that was initiated together with the work on a draft declaration but subsequently abandoned.¹³ The purpose of this study is therefore twofold:

comment *j*. Although generalized references to the freedom of religion or belief appear in the Universal Declaration of Human Rights, Art. 18, GA Res. 217A, UN Doc. A/810, at 71 (1948), the International Covenant on Civil and Political Rights, Art. 18, GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), and regional human rights instruments, the Declaration is the only instrument that addresses the subject in specific terms. For a compilation of the general provisions relevant to the freedom of religion or belief and freedom from discrimination based on religion or belief contained in international and regional instruments, see UN Doc. E/CN.4/L.1417 (1979).

⁸ Comm'n on Human Rights Res. 1986/20, UN Doc. E/CN.4/1986/65, at 66. For discussion in the Commission concerning the need for such a special rapporteur, see UN Doc. E/CN.4/1986/SR.50/Add.1, at 9-14. Several representatives to the Commission objected to the appointment on the ground that the special rapporteur's proposed mandate would overlap with that of the special rapporteur appointed by the Sub-Commission in 1983, who was authorized to study the causes and current dimensions of religious intolerance and discrimination.

⁹ Ribeiro, Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UN Doc. E/CN.4/1987/35 [hereinafter 1987 Ribeiro report].

¹⁰ UN Doc. E/CN.4/1988/45, at 2 [hereinafter 1988 Ribeiro report].

¹¹ Sub-Comm'n Res. 1983/31, UN Doc. E/CN.4/Sub.2/1983/43, at 98. The final report by Special Rapporteur Odio Benito was issued as UN Doc. E/CN.4/Sub.2/1987/26 [hereinafter Odio Benito report]. See also UN Doc. E/CN.4/Sub.2/1985/28 (progress report by Special Rapporteur Odio Benito).

¹² 1988 Ribeiro report, *supra* note 10, at 25, 27; 1987 Ribeiro report, *supra* note 9, at 27; Odio Benito report, *supra* note 11, at 52-53, 57. See also UN Docs. E/CN.4/1988/44 and Add. 1-7 (comments by member states regarding establishment of a working group to draft a binding instrument).

¹³ See note 3 *supra*.

to suggest interpretive approaches to the Declaration that might be useful in the process of implementation, with a focus upon those areas in which conflict is likely to occur; and to identify problems raised by the text of the Declaration that might be addressed in a convention if the effort to draft a binding instrument is revitalized.

I. PRELIMINARY OBSERVATIONS

The norms stated in the Declaration hold a striking potential for conflict with other rights; consequently, the task of applying the Declaration to concrete situations will challenge human rights advocates to devise interpretive approaches that will maximize the protection afforded to all the rights implicated. Two general features of the Declaration are likely to affect the resolution of such conflicts. First, it is directed primarily toward actions taken by governments, or by individuals who do not subscribe to a given religion or belief, against individuals who do hold and practice that belief. Interactions among members of the same religious groups are therefore not easily analyzed under the Declaration. Second, application of the Declaration is most straightforward when the belief or practice under consideration corresponds to a typically Western model of religion, in which religious institutions and authority are structurally separable from political and other social institutions.¹⁴ The greater degree to which religious power may be structurally distinct from political power under this model than it is under other systems does not necessarily imply a formal separation of church and state. Indeed, the protections offered in the Declaration are not premised upon the separation of church and state and are clearly distinguished in this regard from First Amendment rights under the United States Constitution.¹⁵

Detailed analysis of the Declaration should focus primarily on Articles 1 and 2, which state its central principles. Article 1 affirms the right to free-

¹⁴ This model contrasts, for example, with the status of religion in the state structure of Iran. For a historical discussion of the relationship of Shiism to the governance of people, see N. KEDDIE, *RELIGION AND POLITICS IN IRAN: SHI'ISM FROM QUIETISM TO REVOLUTION* (1984). On Islamic ideology and revolutionary potential in the contemporary Middle East, see generally *FROM NATIONALISM TO REVOLUTIONARY ISLAM* (S. Arjomand ed. 1984). See also R. HOWARD, *HUMAN RIGHTS IN COMMONWEALTH AFRICA* 107-13 (1986) (on the relationship between political authority and religion in Commonwealth Africa).

¹⁵ Compare Art. I(d) of the 1967 Draft Convention, *supra* note 3, stating that "neither the establishment of a religion nor the recognition of a religion or belief by a State nor the separation of Church from State shall by itself be considered religious intolerance or discrimination." For discussions of the need to address church-state relations in the Declaration, see, e.g., UN Docs. E/3925/Add.1, at 7, 9 (1964); E/3925/Add.2, at 5 (1964); A/C.3/SR.2011, at 14 (1973); A/C.3/SR.2013, at 23 (1973); E/CN.4/1145, at 12, 17 (1973); E/CN.4/1146, at 8 (1973).

Special Rapporteur Krishnaswami concluded that the formal or legal characteristics of church-state relations do not necessarily bear a causal connection to whether violations of the freedom of religion or belief, or discrimination, will occur or the frequency and seriousness of such violations. A. KRISHNASWAMI, *supra* note 1, at 64-65. See also Odio Benito report, *supra* note 11, at 19-21 (summarizing data received from 29 countries regarding church-state relations).

dom of thought, conscience and belief, and the right to manifest one's religion or belief. Article 2 prohibits discrimination on the basis of religion or belief. Neither provision defines "religion" or "belief," nor are these terms defined elsewhere in the Declaration.¹⁶ Although none of the definitions that were proposed at various stages of the drafting process won acceptance, the *travaux préparatoires* reveal general agreement that "theistic, non-theistic and atheistic beliefs" are all embraced by the phrase "religion or belief."¹⁷

The constitutions of many countries similarly fail to define these terms. Of course, in some countries, such as the United States, the development of case law has compensated for the lack of constitutional definitions.¹⁸ In fact, the omission of definitions of religion and belief from the Declaration may prove more conducive to the protection of freedom of religion and belief than would any definitions that could be agreed upon, for several reasons.¹⁹ First, it would be difficult to formulate a definition of religion, and still more difficult to devise one for belief, broad enough to be acceptable to a large number of states but sufficiently specific to expand the protections afforded. A definition detailing descriptive elements or enumerating types of belief systems protected might well deter acceptance of the norms themselves;

¹⁶ Art. I(a) of the 1967 Draft Convention, *supra* note 3, did include a definition of these terms: "For the purpose of this Convention: (a) the expression 'religion or belief' shall include theistic, non-theistic and atheistic beliefs . . ."

In the absence of a definition within the Declaration itself, Special Rapporteur Odio Benito suggested the following working definition of "religion": "'religion' can be described as 'an explanation of the meaning of life and how to live accordingly.' Every religion has at least a creed, a code of action and a cult." Odio Benito report, *supra* note 11, at 4.

¹⁷ During drafting discussions, it was asserted that "religion or belief" should be understood to include, *inter alia*, monotheism, polytheism, atheism, agnosticism, free thought and animistic beliefs. *See, e.g.*, UN Doc. E/3925, Annex, at 1, 3-4 (1964); 1978 UN ESCOR Supp. (No. 4) at 62, UN Doc. E/1978/34. Conversely, some governments identified systems of thought that should be specifically excluded from the definition such as racism, Nazism and apartheid, UN Doc. A/C.3/L.2033 (1973), and theories on subjects such as philosophy, history, politics, art and science. Analytical Presentation of the Observations received from Governments Concerning the Draft Declaration on the Elimination of All Forms of Religious Intolerance, Note by the Secretary-General, UN Doc. A/9135, at 11 (1973) [hereinafter Observations of Governments]. The view that the phrase "religion or belief" was well understood to refer to both religious and nonreligious beliefs prevailed, and proposed definitions (which continued to be offered as late as 1981) were rejected. *See, e.g.*, UN Docs. E/3925/Add.1, at 10 (1964); A/9135, at 10-11 (1973); E/CN.4/1146/Add.3, at 1 (1974); 1981 UN ESCOR Supp. (No. 5) at 149, UN Doc. E/1981/25.

¹⁸ *See generally* R. MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE AND THE SUPREME COURT (rev. ed. 1982); L. PFEFFER, RELIGIOUS FREEDOM (1977).

For a case study of approaches used by U.S. courts to identify and define practices entitled to protection as religious freedoms, compare *Native American Church of New York v. United States*, 468 F.Supp. 1247 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 205 (2d Cir. 1980) (regarding peyotism as a Native American religion), with *Leary v. United States*, 383 F.2d 851, *reh'g denied*, 392 F.2d 220 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1968) (rejecting First Amendment claims regarding LSD brought by a primate of the Neo-American Church).

¹⁹ For a discussion of descriptive and dictionary definitions of religion, see NEW SOUTH WALES ANTI-DISCRIMINATION BOARD, DISCRIMINATION AND RELIGIOUS CONVICTION 7-12 (1984).

states might argue that the definition does not encompass the religious practices and belief systems prevailing in their territories or might enter reservations that would eviscerate the protections offered. Any definition that purports to describe all the beliefs protected might be cited as a basis for denying protection to genuinely held beliefs that do not correspond to one or more of its particulars.²⁰

Second, if these terms were defined, states might be tempted routinely to label as spurious all expressions of belief and practices that do not conform to the details of the definitions. Examination of the substantive content of beliefs for the purpose of conferring "legitimate religious" status upon them may undermine the basic purposes of the Declaration.

Attempts to define "religion or belief" thus offer little prospect for improvement in the standards of protection for the freedom of religion and belief. Rather, in the implementation of the Declaration (and in the drafting work on a convention, if it is resumed), the parameters of the conduct and expression protected by the substantive provisions of the Declaration must be carefully examined. Those parameters are broadly delineated by the twin principles of the freedom to manifest religion or belief, stated in Article 1 and elaborated in Article 6, and the freedom from discrimination based on religion or belief, set forth in Article 2. This analysis of the Declaration focuses on Article 1, with particular attention to its limitations clause, the scope of the prohibition of discrimination in Article 2, and selected problems of normative conflict.

II. THE SCOPE OF ARTICLE 1

Article 1 of the Declaration states:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice or teaching.
2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

The freedom of thought, conscience and religion set forth in Article 1 should be distinguished from the freedom to manifest religion or belief. As has been observed regarding the nonderogable Article 18 of the Interna-

²⁰ See UN Doc. E/3925, Annex, at 7 (1964); 1981 UN ESCOR Supp. (No. 5) at 140, UN Doc. E/1981/25 (noting that any attempt to enumerate beliefs covered by the phrase "religion or belief" would necessarily be incomplete and thereby defeat the aim of universal application).

tional Covenant on Civil and Political Rights (the Political Covenant),²¹ no limitations upon the freedom of thought and the freedom to have a religion or belief are permissible.²² In contrast, the freedom to manifest one's religion or belief may be subject to restraints imposed to protect other human rights and the various societal interests recognized by the Political Covenant and other human rights instruments.²³

Coercion

The prohibition of coercion which would impair the freedom to have a religion or belief of one's choice, stated in paragraph 2, clearly forbids the use or threat of physical force to compel believers (or nonbelievers) to recant or to convert.²⁴ The general wording of this provision, however, does not elucidate what other conduct, conditions or forms of communication would constitute coercion.²⁵ The municipal law of several countries incor-

²¹ Article 18 of the Covenant, *supra* note 7, provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

²² See Partsch, *Freedom of Conscience and Expression*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 208, 213-14 (L. Henkin ed. 1981); T. VAN BOVEN, *DE VOLKENRECHTELIJKE BESCHERMING VAN DE GODSDIENSTVRIJHEID* 270, 275 (1967). See also A. KRISHNASWAMI, *supra* note 1, at 27.

²³ See Kiss, *Permissible Limitations on Rights*, in Henkin (ed.), *supra* note 22, at 290; Siracusa Principles 1-38, UN Doc. E/CN.4/1985/4, Annex, at 3-6. Cf. European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 9, 213 UNTS 221 (1950); American Convention on Human Rights, Art. 12, reprinted in *ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM* 27, OEA/Ser.L/V/II.65, Doc. 6 (1985) [hereinafter *American Convention*].

²⁴ See, e.g., 1988 Ribeiro report, *supra* note 10, at 5 (reporting allegations that Baha'is in Iran have been tortured and executed in an effort to force them to recant their faith).

²⁵ The draft principles prepared by the Sub-Commission included a more specific definition of coercion: "No one shall be subjected to *material or moral coercion* likely to impair his freedom to maintain or to change his religion or belief" (emphasis added). Draft Principles, *supra* note 1, pt. I(3).

On the need for a more specific definition, see, e.g., 34 UN ESCOR Supp. (No. 4) at 57-58, UN Doc. E/1978/34 (discussing a proposal to include a fuller statement of the various kinds of coercion, such as legal, economic and administrative coercion); see also 36 UN ESCOR Supp. (No. 6) at 72, UN Doc. E/1979/36 (definition proposed by Cyprus).

orporates more specific definitions of coercion, in measures forbidding, for example, "open and overt acts or threats,"²⁶ "physical or moral compulsion"²⁷ and the "use of violence, intimidation or force"²⁸ for the purpose of making people change their beliefs. If the aim of protecting the right to have a religion or belief, which lies at the core of the Declaration, is to be achieved, "coercion" should be interpreted to include mental or psychological means of compulsion as well as physical means. In addition, the prohibition of coercion should extend to such practices as conditioning the receipt of benefits or services from the government upon the renunciation or acceptance of religious beliefs.²⁹

Coercive forms of persuasion, which attack the intellectual and psychological aspects of belief, should be encompassed by the prohibited forms of coercion.³⁰ In two common situations, such "moral" coercion generates conflict between principles stated in the Declaration itself. Proselytizing activities, the first of these, by their very nature attempt moral compulsion to some degree.³¹ Proselytizing may set the rights of those whose religious faith encourages or requires such activity in opposition to the rights of those targeted to be free from coercion to change their beliefs. The latter right is not a legitimate basis for denying believers the freedom to engage in *non-coercive* forms of proselytizing, such as mere appeals to conscience or the display of placards and billboards. The right to freedom of expression for those who proselytize should be considered in weighing protections for the rights of those whom they attempt to convert.³²

The coercive effect of services provided in conjunction with missionary or proselytizing activities, such as medical or educational assistance, was noted by Arcot Krishnaswami in his key study of religious intolerance and discrimination.³³ These forms of inducement to conversion are obviously of special

²⁶ UN Doc. E/CN.4/1986/37/Add.4, at 1 (Mauritius).

²⁷ UN Doc. E/CN.4/1986/37, at 12 (Cyprus).

²⁸ *Id.* at 39 (Spain).

²⁹ See, e.g., 1988 Ribeiro report, *supra* note 10, at 5 (reporting allegations that Baha'i children in Iran are denied admission to the state school system unless they formally convert to Islam).

³⁰ See Draft Principles, *supra* note 1, pt. I(3).

³¹ Cf. UN Doc. CCPR/C/SR.202, at 7 (1980) (statement by representative of Mongolia, characterizing the very holding of religious services as a form of religious propaganda).

³² Regarding the legal restrictions imposed by some countries on proselytizing, see 1987 Ribeiro report, *supra* note 9, at 11. See also Odio Benito report, *supra* note 11, at 13. The right to propagate religion is legally protected in some countries. See, e.g., UN Doc. E/CN.4/1987/37, at 29 (Pakistan). Cf. UN Doc. E/CN.4/SR.319, at 6-7 (1952) (regarding the need to check interpretations of Art. 18(2) of the Political Covenant, *supra* note 21, prohibiting coercion, that would jeopardize the freedom of teaching, worship and observance or preclude persuasive methods).

Article 12(1) of the American Convention, *supra* note 23, explicitly affirms the right to "disseminate" one's religion or beliefs.

³³ A. KRISHNASWAMI, *supra* note 1, at 41. See also T. VAN BOWEN, *supra* note 22, at 274 (arguing that the freedom to change one's religion or belief "does not constitute a license to proselytize by offering attractive social and material profits or by exerting undue pressure upon persons in a vulnerable position"); 36 UN GAOR (73d plen. mtg.) at 1219, UN Doc. A/36/PV.73 (1981) (regarding "impermissible material incentives").

concern to countries with histories of colonial domination linked to missionary activities,³⁴ although the problem of economic inducements is not limited to that context.

A desire to avoid the implicit approval of proselytizing was one of the considerations underlying the omission from the Declaration of an explicit reference to the freedom to change one's religion or belief.³⁵ Because the basic freedom to hold a religion or belief is not subject to limitation, in a situation of conflict the right to engage in coercive forms of proselytizing as an expression of religious belief must yield to the right of individuals to hold a belief of their choice without impairment.

The right of individuals to maintain their own beliefs is central to the concerns that motivated the drafting of the Declaration itself. This principle necessarily entails not only the right to retain a belief, but also the freedom to choose a belief without coercion, including the right to reject one's current belief and accept another. Although explicit reference to the right to change beliefs was dropped from the Declaration,³⁶ that right remains implicit in the right to have a religion or belief. Moreover, Article 8, the savings clause of the Declaration, preserves the standards set forth in the Universal Declaration of Human Rights (the Universal Declaration)³⁷ and the International Covenants on Human Rights by stating that "[n]othing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights." The Universal Declaration affirms the freedom to change beliefs and the Political Covenant refers to the freedom to adopt a religion or belief.³⁸

Nonetheless, the parameters of the right to change one's religion or belief remain uncertain, as illustrated by the difficulty of evaluating the treatment to be accorded apostates and heretics under the Declaration, a second area implicated by the prohibition of coercion. Apostasy and heresy present potential conflicts between the right of individuals to believe what they choose and the right of religious groups to promulgate doctrine as a part of religious practice. Such conflict illustrates the difficulty encountered in attempting to reconcile competing religious interests. History is replete with examples of religious persecution perpetrated in the guise of punishment

³⁴ See, e.g., Nsereko, *Religion, the State and the Law in Africa*, 28 J. CHURCH & ST. 269, 273 (1986) (noting that "the majority of African states cannot dispense with the church's role in education. Therefore, many African states permit churches to operate schools and allow religion to be taught as a subject in public schools").

³⁵ See Clark, *supra* note 3, at 200; see, e.g., UN Doc. A/C.3/SR.2009, at 4 (1973) (statement by Saudi Arabian representative characterizing proposed reference to the right to change religions as designed to benefit missionary religions).

Regarding opposition to inclusion of the right to change religions in the Universal Declaration, see N. ROBINSON, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 128-29 (1958). Regarding objections to its inclusion in the Political Covenant on the ground that it would encourage missionary activities, see, e.g., UN Doc. A/C.3/SR.367, para. 41 (1951).

³⁶ See UN Docs. A/36/684, at 2-3 (1981); A/C.3/36/SR.43, at 2 (1981).

³⁷ See note 7 *supra*.

³⁸ 36 UN GAOR (73d plen. mtg.) at 1218-19, UN Doc. A/36/PV.73 (1981).

for heresy. If religious and secular authorities overlap and attempt to suppress the expression of belief by alleged heretics through punitive measures, such as stripping them of secular privileges or property rights (as in the case of the Baha'is in Iran), it is again the right of individuals to adhere to, or to change, their beliefs that should be accorded greater weight.³⁹

Morals and the "Fundamental" Rights of Others

Like Article 18 of the Political Covenant (from which it was drawn), Article 1 of the Declaration permits restraints prescribed by law and necessary for the protection of public safety, order, health or morals and the fundamental rights and freedoms of others. Given the breadth and vagueness of these terms, analyses of specific restrictions must guard against interpretations that would eviscerate the safeguards created and magnify uncertainties concerning the resolution of conflicts. Of the bases for restriction recognized, "public morals" and the "fundamental rights and freedoms of others" may be singled out for comment as bearing particularly interesting relationships to the freedom of religion or belief. The first of these, restraints based upon public morals, may, because of the inherent vagueness of the concept of morals,⁴⁰ be abused to challenge the principles upon which the Declaration is based through attacks on the expression of beliefs and practices that diverge from the norm or majoritarian values.⁴¹

The reference in Article 1(3) to the "fundamental rights and freedoms of others" as a basis for limiting the freedom to manifest religion also poses problems of interpretation. Like Article 18 of the Political Covenant, para-

³⁹ See A. KRISHNASWAMI, *supra* note 1, at 38; 1987 Ribeiro report, *supra* note 9, at 15. See also *id.* (characterizing the practice of forbidding the members of a community considered heretical to claim kinship with the majority religion as an infringement of Art. 1).

⁴⁰ Article 29(2) of the Universal Declaration recognizes morality as a basis for restrictions, as do all the limitation clauses in the Political Covenant. See Kiss, *supra* note 23, at 303-04.

In *Handyside v. U.K.*, 24 Eur. Ct. H.R. (ser. A) (1976), the European Court found that it was impossible to find a uniform European concept of "morals" in the domestic law of the European states. The Court observed that views on the requirements of morals "var[y] from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinion on the subject." *Id.* at 22. *Accord*, *Dudgeon v. U.K.*, App. No. 7525/76, Eur. Comm'n H.R., Report of Mar. 13, 1980, *aff'd*, 45 Eur. Ct. H.R. 21 (ser. A) (1981). See also Communication No. 61/1979, *Hertzberg v. Finland*, International Covenant on Civil and Political Rights, Human Rights Committee, Selected Decisions under the Optional Protocol (2d-16th sessions), UN Doc. CCPR/C/OP/1, at 124, 126 (1985).

Of the 29 states providing data to Special Rapporteur Odio Benito, 15 indicated that legislative or constitutional limitations upon the freedom to manifest religion or belief currently include "morals." Odio Benito report, *supra* note 11, at 29.

⁴¹ See, e.g., UN Docs. E/CN.4/1988/43, at 10-11 (response from Government of Colombia, noting that the constitutional provision guaranteeing the freedom to practice any religion not contrary to Christian morality reflects the fact that Catholicism has historically been the religion professed by the majority of Colombians); E/CN.4/1987/37, at 13 (response from Government of Panama, noting that Christian morality is included, with public order, as one of two grounds for imposing limitations on the freedom to practice all religions, in recognition of the fact that Catholicism is the majority religion).

graph 3 refers to the "fundamental" rights and freedoms, and not merely the rights and freedoms, of others.⁴² The phrase "fundamental rights" does not occur elsewhere in the Declaration. A similar phrase, "fundamental human rights," appears in paragraph 5 of the Preamble to the Universal Declaration, paragraph 1 of the Preamble to the Convention on the Elimination of All Forms of Discrimination Against Women⁴³ (the Discrimination Against Women Convention) and Article 5(2) of the Political Covenant. Articles 2, 3 and 4,⁴⁴ and preambular paragraphs 1 and 3 of the Declaration employ the phrase "human rights and fundamental freedoms," as do several articles of the Charter of the United Nations, and paragraph 6 of the Preamble and Article 26(2) of the Universal Declaration. The use of the term "fundamental" to qualify "freedoms" (rather than "rights") is the formulation most common among the major international human rights instruments. Article 7 of the Declaration speaks of "rights and freedoms" without any qualifying term, a phrase that also appears in the other instruments mentioned above.

Because the phrase "fundamental rights" appears only in paragraph 3 of Article 1, it arguably narrows the range of human rights that will serve as legitimate bases for restrictions to include only those human rights considered to be "fundamental."⁴⁵ However, as Professor Meron recently argued in his cogent examination of the concept of a hierarchy in human rights norms, the use of the term "fundamental" to imply a hierarchical relationship between fundamental rights and other rights may be misleading.⁴⁶ As he pointed out, the terms "human rights" and "fundamental rights" are used interchangeably in international and regional human rights instruments. This inconsistency in terminology and, except for a small number of *jus cogens* rights, the absence of any general agreement on the greater importance of some human rights vis-à-vis others suggest that there is no substantive or definable legal distinction between those human rights that are "fundamental" and those that are not. The characterization of some

⁴² The limitations clause of the Draft Principles, *supra* note 1, employed the wording in Article 29(2) of the Universal Declaration, which cites the "rights and freedoms" of others as grounds for limitations. Article XII of the 1967 Draft Convention, *supra* note 3, permitted limitations based on the "individual rights and freedoms of others."

⁴³ GA Res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46 (1979).

⁴⁴ For the text of Article 4, see note 6 *supra*. For Article 2, see text *infra* at p. 501. Article 3 is couched in hortatory language:

Discrimination between human beings on grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the *human rights and fundamental freedoms* proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations [emphasis added].

⁴⁵ T. MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS: A CRITIQUE OF INSTRUMENTS AND PROCESS 181-82 (1986).

⁴⁶ *Id.* at 178-89; see also Meron, *On a Hierarchy of International Human Rights*, 80 AJIL 1 (1986).

rights as fundamental seems to rest primarily upon subjective views of their importance.⁴⁷

Because the catalog of those rights possessing "fundamental" status is itself subject to differing interpretations, the objectivity suggested by hierarchical terminology proves deceptive when analysis of a particular situation of conflict is attempted. Indeed, the freedom of religion itself is described in the Declaration not as a "fundamental human right" but as a "human right and fundamental freedom" (Preamble, paragraph 3), which again echoes the dominant phrase in the Charter of the United Nations. A conflict might arise, for example, if Article 11 of the Discrimination Against Women Convention, which prohibits discriminatory employment practices, were applied to a business engaged in some activity barred to women by religious doctrine. Normative conflicts between the Declaration and the Convention are not resolvable under the savings clause of either instrument.⁴⁸ International state practice reveals that there is no consensus on the fundamental status of women's right to employment, yet this right is vital to the aims of the Convention. A conflict between women's right to employment and the right to observe religious teachings thus cannot be resolved by determining in the abstract that the employment right does or does not have fundamental status.

Although the savings clause of the Declaration, Article 8, appears to regulate conflicts between religious rights and other rights, it provides only that nothing in the Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration or the Covenants, and does not address conflict with other instruments. Moreover, Article 8 does not even provide sufficient guidance for the resolution of conflicts involving rights stated in the instruments that are specified. For example, restrictions upon proselytizing, which may be permissible under the Declaration to protect the rights of those targeted by the proselytizing activities,

⁴⁷ T. MERON, *supra* note 45, at 156, 178-83.

On the use of "fundamental" in the limitations clause of Article 18 of the Political Covenant, from which Article 1(3) of the Declaration was drawn, see UN Doc. E/CN.4/SR.319, at 4, 14 (1952) (regarding UK proposal, later defeated, to delete "fundamental" because "the intention was to refer rather to *personal* rights and freedoms"; *id.* at 4 (emphasis added)). See also *id.* at 64 (uniform limitations clause for the Political Covenant proposed by the Secretary-General, omitting the word "fundamental" from the reference to the rights and freedoms of others).

⁴⁸ T. MERON, *supra* note 45, at 77-78, 153-54.

Article 11 of the Convention, *supra* note 43, requires states to ensure for women, on a basis of equality with men, the same rights, *inter alia*, to employment opportunities (including application of the same criteria for selection), free choice of profession and employment, promotion, job security and all benefits and conditions of service, and equal remuneration, including benefits.

For the text of Article 8, the savings clause of the Declaration, see text at note 37 *supra*. Article 23, the savings clause of the Discrimination Against Women Convention, provides: "Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained: (a) In the legislation of a state party; or (b) In any other international convention, treaty or agreement in force for that state."

may conflict with the freedom of expression guaranteed in Article 19 of the Political Covenant. This conflict is more apparent than real, however, because Article 19 itself permits restrictions on the freedom of expression that are necessary for respect of the rights or reputations of others.⁴⁹

The Boundary Between Religion and Politics

Arguments that the conduct restricted by the state is not religious in nature or that the individuals and groups affected are not engaged in religious activities are often advanced as a means of circumventing the broadly framed requirements of paragraph 3. All too frequently, a state seeking to suppress religious freedoms characterizes the activities of religious groups and leaders as impermissible political action or subversion.⁵⁰ The absence of a definition of religion or belief may facilitate such denials of the true basis for restrictions or oppression by the state, but probably has little substantive effect upon whether states will commit such abuses.

Governments do have a legitimate interest in controlling violence against the state or disruptions of public order, and may do so by using methods consistent with other human rights obligations. Nonetheless, governmental violations of religious freedoms and persecution of religious leaders and groups under the pretense of restraining impermissible political activity are far more prevalent than is the use of a religious identity to camouflage actions motivated by purely partisan political concerns. Although national security as a rationale for restrictions was omitted from the Declaration,⁵¹ limitations necessary to protect public safety and order are authorized by paragraph 3. Given the vagueness of these terms, there is a risk that states will cite them to justify restrictions on religious freedom imposed for reasons tantamount to national security interests, by arguing that a religious group is engaged in political activities that endanger public safety and order.⁵²

⁴⁹ The limitations clause of Article 19 of the Covenant, *supra* note 7, provides:

3. The exercise of the [freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

⁵⁰ See, e.g., 1987 Ribeiro report, *supra* note 9, at 13; UN Doc. E/CN.4/1987/SR.25, at 6, 8.

⁵¹ Cf. 1967 Draft Convention, *supra* note 3, Art. XI (providing that "[n]othing in this Convention shall be interpreted as giving to any person, group or institution the right to engage in activities aimed at prejudicing national security, national sovereignty or friendly relations between nations").

Of the 29 states providing data to Special Rapporteur Odio Benito, 5 indicated that limitations on the basis of security were in effect. Odio Benito report, *supra* note 11, at 29. See generally Kiss, *supra* note 23, at 295-97 (regarding national security as a ground for limitations).

⁵² See, e.g., UN Doc. A/C.3/36/SR.32, at 13 (1981) (statement by representative of Australia, asserting that the draft Declaration did not give individuals or groups the right to participate in political activities against the interests of the state).

Not only is the distinction between religious and political activity subject to frequent abuse by states, but it also highlights a theoretical uncertainty concerning the scope of the beliefs protected by the Declaration. Many religious doctrines or beliefs dictate standards of social conduct and responsibility, and require believers to act accordingly. For those adherents who follow such precepts of social responsibility, the distinction between religious and political activities may be artificial.⁵³ For example, pacifist religious convictions may prompt an individual to participate in public protest, to refuse to pay taxes used for military expenses and to attempt to influence decisions made by political leaders. Religious beliefs inevitably assume political significance in such circumstances.

Indeed, the intensity with which believers commonly assert their faith, the highly organized character of many religious groups and the magnitude of their followings lend those groups formidable political power.⁵⁴ Moreover, the structural separation of secular and religious authority is obviously not a universal feature of societies, as demonstrated by Iran.⁵⁵ Finally, political beliefs are presumably subsumed within the general category of "beliefs" to which the Declaration extends and are protected under that rubric.⁵⁶ As Professor Partsch and others have observed regarding Article 13 of the Political Covenant, the freedom of thought that is affirmed in Article 1 of the Declaration embraces political and social thought.⁵⁷

Article 6, which sketches the contours of the basic right to religious freedom broadly stated in Article 1, enumerates rights that are for the most part equally relevant to nonreligious beliefs.⁵⁸ Paragraphs (c) and (h), which

⁵³ See Woods, *Church Lobbying and Public Policy*, 28 J. CHURCH & ST. 183, 189 (1986); van Boven, *Religious Liberty in the Context of Human Rights*, 37 ECUMENICAL REV. 345, 350-51 (1985).

⁵⁴ See UN Doc. E/CN.4/Sub.2/1985/28, at 12.

⁵⁵ See note 14 *supra*.

⁵⁶ For national views concerning the scope of "belief," see, e.g., UN Doc. E/CN.4/1986/37, at 22 (response of the Government of the Federal Republic of Germany, noting that associations whose purpose is the cultivation of a philosophical ideology have the same status as religious bodies); *id.* at 37 (response of the Government of Spain, reporting that activities or study relating to psychic phenomena or to humanistic or spiritualistic values are not protected manifestations of belief); Observations of Governments, *supra* note 17, at 4 (response of the Government of Austria, stating that "belief" encompasses only those beliefs of a transcendental character and does not include every philosophy, particularly not purely political philosophy); *id.* at 11 (response of the Government of Sweden, excluding theories on subjects such as philosophy, history, politics and science from the purview of "belief"); UN Doc. A/C.3/SR.2012, at 12 (1973) (statement by representative of the German Democratic Republic, rejecting the view of the Austrian Government that "belief" refers only to "transcendental" philosophies); *accord id.* at 13 (statement by representative of the Netherlands).

⁵⁷ Partsch, *supra* note 22, at 213-14; Lillich, *Civil Rights*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 115, 159 n.243, 245 (T. Meron ed. 1984).

⁵⁸ Article 6 stipulates that, subject to the provisions of Article 1(3),

the right to freedom of thought, conscience, religion or belief shall include, *inter alia*, the following freedoms:

(a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;

detail rights regarding the use of ritual articles and materials and the observation of holidays and days of rest, primarily concern religious belief. The remaining rights enumerated in Article 6, however (including, for example, the freedoms to assemble and maintain places for assembly, to write and distribute publications, and to engage in national and international communication in matters of belief), obviously apply to nonreligious as well as religious belief. Article 6 thus protects a limited number of practices that are generally significant to both religious and nonreligious beliefs. Discussion of the extensive range of practices implicated by the freedom to manifest religion or belief, but not mentioned in Article 6, is beyond the scope of this article.⁵⁹

III. THE SCOPE OF THE PROHIBITION OF DISCRIMINATION AND INTOLERANCE

The Prohibition of Discrimination

The companion principle to the freedom to manifest religion is the right to be free from discrimination on grounds of religion or belief, stated in Article 2, which provides:

1. No one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other beliefs.

2. For the purposes of the present Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

The wording of Article 2(2) is borrowed from the definition of racial discrimination in Article 1 of the International Convention on the Elimina-

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- (b) To establish and maintain appropriate charitable or humanitarian institutions;
 - (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
 - (d) To write, issue and disseminate relevant publications in these areas;
 - (e) To teach a religion or belief in places suitable for these purposes;
 - (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
 - (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
 - (h) To observe days of rest and celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
 - (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

⁵⁹ For discussion of the wide range of practices associated with religion or belief, factors that may justify restrictions on those practices and specific protections required for certain freedoms of religion or belief, see A. KRISHNASWAMI, *supra* note 1, at 43-62. The Draft Principles, *supra* note 1, part II, and the 1967 Draft Convention, *supra* note 3, Article III, included fuller listings of the specific rights encompassed by the freedom of religion or belief than that contained in Article 6 of the Declaration.

tion of All Forms of Racial Discrimination (the Racial Discrimination Convention).⁶⁰ Like the Convention, the Declaration prohibits distinctions which have adverse effects on human rights in addition to those which are implemented for the purpose of impairing or nullifying such rights. In barring unintentional as well as intentional acts of discrimination, Article 2 expands the protection afforded by permitting the inference of purpose from effect.⁶¹ As is true of racial discrimination, discrimination on grounds of religion or belief may be ingrained in socioeconomic and cultural institutions. A prohibition upon acts having a discriminatory effect as well as those having a discriminatory purpose may thus be essential to eliminating certain forms of discrimination.⁶²

Finally, by prohibiting acts that have a discriminatory effect as well as purpose, the Declaration reaches not only the discriminatory imposition of civil, political, economic, legal or social disabilities, but also the extension of benefits to some religious groups and not others. For example, if governments grant tax-exempt status to certain religious groups only, other groups will be required to devote financial resources to tax payments that otherwise would have been available to fund their religious activities. Such schemes thus have a discriminatory effect upon the groups not allotted benefits.

Paragraph 2 of Article 2 does not explicitly address the intended reach of the prohibition of discrimination. However, if paragraph 1 of Article 2 is read in conjunction with Article 3 and paragraph 1 of Article 4,⁶³ the prohibition must be interpreted to apply to both public and private action. Paragraph 1 of Article 2 forbids discrimination by "any State, institution, group of persons, or person." This formulation echoes Article 2(1) of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination (the Racial Discrimination Declaration), which proscribes discrimination by any "State, institution, group or individual."⁶⁴ The conduct of "private," nongovernmental institutions and groups as well as that of governmental authorities thus falls within the scope of Article 2. As the word "person" in the singular indicates, acts of discrimination committed

⁶⁰ *Opened for signature* Mar. 7, 1966, 660 UNTS 195, reprinted in 5 ILM 352 (1966). Article 1(1) of the Racial Discrimination Convention defines racial discrimination as

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

⁶¹ T. MERON, *supra* note 45, at 11-16; Greenberg, *Race, Sex and Religious Discrimination in International Law*, in 2 Meron (ed.), *supra* note 57, at 307, 322 (1984).

⁶² On the nexus between racial discrimination and discrimination on the ground of religion or belief, see *infra* pp. 507-10.

⁶³ For the text of Article 3, see note 44 *supra*. For the text of Article 4, see note 6 *supra*.

⁶⁴ GA Res. 1904, 18 UN GAOR Supp. (No. 15) at 35-37, UN Doc. A/5515 (1963). Cf. Racial Discrimination Convention, *supra* note 60, Art. 2(1)(d) (requiring states parties to prohibit and eliminate racial discrimination by "any persons, group or organization"); Discrimination Against Women Convention, *supra* note 43, Art. 2(e) (requiring states parties to take "all appropriate measures to eliminate discrimination against women by any person, organization or enterprise") (emphasis added).

by one individual against another are encompassed by Article 2.⁶⁵ The language of Article 3 confirms this interpretation, by condemning discrimination "between human beings."⁶⁶ Moreover, in a departure from the definition set forth in the Racial Discrimination Convention, Article 2(2) omits the clause in the latter that extends the prohibition of discrimination to the "political, economic, social, cultural or any other field of *public life*."⁶⁷ (Other provisions of the Racial Discrimination Convention nevertheless demonstrate that the intention was to reach private action as well.) Consequently, interpersonal and familial relationships are subject to the strictures of Article 2.

The legislative history reveals some disagreement over the inclusion of antidiscrimination provisions applicable to private institutions and individuals. One government, for example, commenting upon the drafts prepared by the Sub-Commission⁶⁸ and the Commission,⁶⁹ stated that the phrase "'institutions, groups or individuals' [might] be deleted because there may be private religious institutions who [*sic*] can't be compelled in this regard."⁷⁰ The phrase "discrimination by any State, institution, group of persons, or person" in Article 2(1), taken together with Article 4, which obliges states to prevent and eliminate discrimination through legislative and other measures, clearly requires states to regulate nongovernmental conduct irrespective of whether national law authorizes such regulation. Moreover, the phrase "public life" was included in proposed versions of the definition of discrimination that reproduced the definition contained in the Racial Discrimination Convention, but was deleted from the final version of Article 2(2).⁷¹

In contrast, the obligation to take positive measures against religious discrimination, stated in Article 4, extends only to states and not to individuals.⁷² Here the legislative history indicates that the drafters rejected

⁶⁵ Questionnaires prepared in connection with Special Rapporteur Odio Benito's study requested information from governments regarding measures taken to eliminate intolerance and discrimination, "whether proceeding from official circles or individuals or groups of persons." UN Doc. E/CN.4/Sub.2/1984/28, Ann. I, at 2.

Cf. T. MERON, *supra* note 45, at 18-23, 61-63 (on the application of the Racial Discrimination Convention and the Discrimination Against Women Convention to nongovernmental, private contexts). See also Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AJIL 283 (1985).

⁶⁶ Article 1 of the Racial Discrimination Declaration, *supra* note 64, also refers to discrimination "between human beings."

⁶⁷ The definition of discrimination contained in the 1967 Draft Convention, *supra* note 3, Article I(b), did include the qualifying phrase "any other field of *public life*" (emphasis added).

⁶⁸ See 1964 Sub-Commission Draft Declaration, *supra* note 3, Art. 2.

⁶⁹ See 1964 Commission Draft Declaration, *supra* note 3, Art. III.

⁷⁰ Observations of Governments, *supra* note 17, at 12 (India); accord UN Doc. A/C.3/SR.2013, at 6 (1973) (statement by representative of the Byelorussian Soviet Socialist Republic, expressing agreement with proposal for deleting this phrase, on the same ground advanced by the Government of India). See also UN Doc. E/3925/Add.2, at 11 (1964).

⁷¹ See, e.g., 1979 UN ESCOR Supp. (No. 6) at 70, UN Doc. E/1979/36.

⁷² Cf. UN Doc. E/CN.4/1146/Add.1, at 4 (1974) (proposed article stating that "no organization or individual shall have the right to invoke this Declaration if they impair the rights of citizens") (emphasis added).

proposed wording that required "particular efforts" to be made by "everyone to prevent and eliminate discrimination on the ground of religion or belief."⁷³

Like the Racial Discrimination Declaration and Convention and the Discrimination Against Women Convention, the Declaration extends the prohibition of discrimination beyond conduct attributable to the state. The Declaration therefore applies to religious communities themselves; although they are not bound to take positive measures to eliminate discrimination, their conduct is governed by the prohibition of discrimination based on religion or belief.

The necessarily broad reach of Article 2 carries with it the potential for conflicts between principles set forth in the Declaration and obligations imposed by other human rights instruments or between principles stated in the Declaration itself. Consider the example of a religious custom or precept forbidding marriages between members of that faith and members of a different faith. On the one hand, the proscription of marriage outside the faith may be vital to preserving the identity of the religious community and may even be an important doctrinal feature of the faith. On the other hand, this practice constitutes discrimination on the basis of religion against a would-be spouse of another faith, and infringes the associational and privacy rights of both individuals. Because the state is obliged to eliminate discrimination, the application of Article 2 to the private context encourages, and indeed requires, the state to regulate interpersonal and intrareligious affairs to some degree.

Intolerance

The definition set forth in Article 2(2) refers not to discrimination alone, but to "intolerance and discrimination." Article 4(2) suggests a distinction between the two in calling for legislative action to prohibit discrimination while exhorting states to take "all appropriate measures" to combat intolerance.⁷⁴ Earlier drafts of the Declaration employed the two terms separately and the word "discrimination" was added to the title of the instrument at a later stage.⁷⁵ Two general views have been taken of the meaning of "intolerance" and its significance in the Declaration. The first, that the term lacks juridical meaning and refers to prejudice or a state of mind, was advanced during the drafting process,⁷⁶ and has been emphasized subsequently in discussions of educational measures to promote the Declaration.⁷⁷ The sec-

⁷³ 1980 UN ESCOR Supp. (No. 3) at 111-12, UN Doc. E/1980/13.

⁷⁴ For the text of Article 4, see note 6 *supra*.

⁷⁵ GA Res. 3267, 29 UN GAOR Supp. (No. 31) at 88, UN Doc. A/9631 (1974).

⁷⁶ See, e.g., UN Docs. E/3925, Annex, at 3 (1964) (defining "intolerance" as a mental attitude or psychological state); A/4134, at 5 (1973) (stating that "intolerance" refers primarily to a subjective attitude).

⁷⁷ See, e.g., United Nations Seminar on the Encouragement of Understanding, Tolerance and Respect in Matters Relating to Freedom of Religion or Belief, UN Doc. ST/HR/SER.A/16, at 7 (1984) (defining tolerance as acceptance by individuals of the right of others to hold different views, i.e., an act of understanding) [hereinafter 1984 Geneva Seminar]; Odio Benito report, *supra* note 11, at 64.

ond view, that intolerance refers to conduct manifesting hatred or prejudice based on religion or belief as well as to a state of mind, underlies descriptions of various human rights violations, such as attacks upon the physical integrity of the person, as intolerance.⁷⁸

As defined in Article 2(2), intolerance is synonymous with discrimination and the two terms have been used interchangeably.⁷⁹ Yet linking intolerance with discrimination, which has a clear legal meaning, seems gratuitous if the former bears no independent relationship to the aims of the Declaration. The view that intolerance describes the emotional, psychological, philosophical and religious attitudes that may prompt acts of discrimination or violations of religious freedoms is persuasive. Where intolerance fuels such conduct as killing or the destruction of property, these acts constitute violations of substantive international human rights, such as the right to life, and, in most cases, violations of national law. If intolerance motivates deprivations of the freedom to manifest religion or belief, these acts again constitute violations of substantive rights protected by the Declaration itself.⁸⁰

The distinction between intolerance and discrimination may be usefully analogized to the distinction between racial prejudice and racism. Attitudes of hatred and fear toward religious groups may be rooted in phenomena such as histories of conflict between religious communities and the competing interests underlying those conflicts, religious doctrines that condemn nonbelievers and condone their oppression or eradication, state propaganda against religious belief, and racial or ethnic conflict.⁸¹ So understood, intolerance is not a particular type of violation of religious freedom or of discrimination, but the attitudes that may motivate such violations.

From this interpretation it follows that educational measures to eradicate intolerance are of vital significance. Educational activities obviously lie within the scope of the "appropriate" measures contemplated by Article 4(2), although no express reference to such activities appears in the Declara-

⁷⁸ See, e.g., Clark, *supra* note 3, at 209; Clark, *The United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 31 CHITTY'S L.J. 23, 34 n.9 (1983); 1987 Ribeiro report, *supra* note 9, at 12, 14-15; Odio Benito report, *supra* note 11, at 3-4.

⁷⁹ See, e.g., 1987 Ribeiro report, *supra* note 9, at 11-13; UN Doc. E/CN.4/1986/SR.30/Add.1.

The 1967 Draft Convention included the following tautological definition of "intolerance": "the expression religious intolerance shall mean intolerance in matters of religion or belief . . ." 1967 Draft Convention, *supra* note 3, Art. I(c). Similarly, the questionnaire prepared in connection with Special Rapporteur Odio Benito's study, which requested information from governments regarding legislative or other measures taken to combat intolerance and discrimination, defined both intolerance and discrimination as "distinction, exclusion, restriction or preference." UN Doc. E/CN.4/Sub.2/1984/28, Ann. I, at 28.

⁸⁰ See 1988 Ribeiro report, *supra* note 10, at 24 (regarding the relationship between religious intolerance and infringements of various human rights, such as the right to life); UN Doc. E/CN.4/1987/SR.23, at 7 (regarding the relationship between violations of religious freedoms and violations of other human rights).

⁸¹ See UN Doc. E/CN.4/Sub.2/1985/28, at 12.

tion.⁸² Efforts to promote and implement the Declaration should compensate for the omission of a provision explicitly calling for educational measures by emphasizing the importance of such activities.

A second approach to combating intolerance, which was proposed during drafting but rejected, is to prohibit the expression of ideas based on religious hatred and the incitement of hatred and discrimination based on religion or belief.⁸³ The link between eliminating intolerance and such a prohibition is implicit in those proposed definitions that described intolerance as "any expression or act of discrimination or hatred"⁸⁴ or as "acts which stir up hatred against or persecution of individuals or groups" (as well as discrimination against them).⁸⁵ A prophylactic measure of this type appears in Article 4 of the Racial Discrimination Convention.⁸⁶

As Article 4 of the Declaration makes clear, states are obliged not only to punish discrimination, but also to take preventive measures against it. A bar upon expressions of hatred and incitement to hatred, acts of violence or discrimination may constitute an effective preventive means of promoting the goals of the Declaration, but may require restrictions that conflict with the freedoms of expression and association. The arguments for and against such a provision should therefore be considered carefully if a convention is drafted at some time in the future. In any event, generalities concerning the desirability of a provision of this type are of little value. In some countries, discriminatory propaganda and invective may constitute incitement to violence and discrimination giving rise to a clear and present danger that religious freedoms will be violated; while in others, political and legal institutions may defuse the often serious threat to human rights created by such expression.⁸⁷

Remedial Measures

The lack of specific guidance concerning measures to prevent discrimination is matched by lacunae concerning measures to provide redress for

⁸² Cf. Racial Discrimination Declaration, *supra* note 64, Art. 8 (calling for "all effective steps . . . in the fields of teaching, education and information with a view to eliminating racial discrimination"); Declaration on the Elimination of Discrimination Against Women, GA Res. 2263, 22 UN GAOR Supp. (No. 16) at 35, UN Doc. A/6716 (1967) [hereinafter Discrimination Against Women Declaration], Art. 3 (calling for measures to "educate public opinion" for the purpose of abolishing prejudice and customary and other practices based on the idea of women's inferiority); Racial Discrimination Convention, *supra* note 60, Art. 7 (calling for effective measures, "particularly in the fields of teaching, education, culture and information, with a view to combatting prejudices which lead to racial discrimination").

⁸³ The 1964 Sub-Commission Draft Declaration, *supra* note 3, did incorporate such a provision, in Article XIV(2) and (3), as did the 1967 Draft Convention, *supra* note 3, in its Article IX.

⁸⁴ 1979 UN ESCOR Supp. (No. 6) at 70, UN Doc. E/1979/36 (emphasis added).

⁸⁵ Odio Benito report, *supra* note 11, at 4.

⁸⁶ See POSITIVE MEASURES DESIGNED TO ERADICATE ALL INCITEMENT TO, OR ACTS OF, RACIAL DISCRIMINATION: IMPLEMENTATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, UN Doc. CERD/2, UN Sales No. E.85.XIV.2 (1986); T. MERON, *supra* note 45, at 23-35.

⁸⁷ See Greenberg, *supra* note 61, at 323-24.

existing discrimination: the Declaration makes no mention of the right to equality before the law or any obligation to provide effective remedies for violations of the principles of the Declaration. The guarantee of equality before the law is essential to securing human rights as well as equal rights under national law. The guarantee of equal protection is, of course, affirmed in the Universal Declaration (Article 7) and the Political Covenant (Article 26). Moreover, the Declaration does not state a right to effective administrative and judicial remedies for harm suffered as a result of discrimination on the basis of religion or belief and violations of the freedom of religion or belief.⁸⁸ Judicial and administrative remedies serve not only to redress the harm suffered, but also to deter future acts of discrimination. In addition, such remedies further the implementation of the Declaration by providing individuals with an avenue for its enforcement even when the state is inactive.⁸⁹ The development of such measures should be emphasized in implementation of the Declaration and the right to effective remedies should eventually be incorporated into a convention.

The Nexus Between Religious and Racial Discrimination

As a whole, the Declaration affords more specific, and therefore more rigorous, protection to the freedom to manifest belief than to the freedom from discrimination. The antidiscrimination provisions are less detailed than those found in other declarations addressing discrimination. The Discrimination Against Women Declaration, for example, spells out particular practices from which discrimination is to be eliminated in fields such as education (Article 9) and employment (Article 10).⁹⁰

⁸⁸ The 1964 Commission Draft Declaration, *supra* note 3, Article III(2), provided: "Everyone has the right to effective remedial relief by the competent national tribunals against any acts violating the rights set forth in this Declaration or any acts of discrimination he may suffer on the grounds of religion or belief . . ." The 1967 Draft Convention similarly addressed the availability of remedies, requiring states to

ensure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions against any acts, including acts of discrimination . . . , which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such acts.

1967 Draft Convention, *supra* note 3, Art. X. Examples of provisions asserting a right to effective remedies appear in several international human rights instruments, including the Universal Declaration, *supra* note 7 (Art. 8), the Political Covenant, *supra* note 7 (Art. 2(3)), and the Racial Discrimination Declaration, *supra* note 64 (Art. 7(2)).

⁸⁹ Special Rapporteur Ribeiro has emphasized the need to make effective remedies available to victims of intolerance and discrimination based on religion or belief; he recommended that the Declaration be disseminated widely among those responsible for protecting the right to freedom of religion or belief, such as judges, lawyers and civil servants. 1988 Ribeiro report, *supra* note 10, at 28.

⁹⁰ Article 9 of the Discrimination Against Women Declaration, *supra* note 82, lists, *inter alia*, equal conditions of access to educational institutions of all types, the same choice of curricula and equal opportunities to benefit from scholarships as areas in which all appropriate measures shall be taken to ensure equal rights for women. Similarly, Article 10 enumerates specific

Religion is often a central component of ethnic group identity, inextricably enmeshed in the political, cultural and socioeconomic life of the community.⁹¹ Of course, ethnic or racial identity and religious affiliations are not always congruent, as illustrated by the Baha'is.⁹² Even in the latter circumstance, however, religious groups are often readily distinguishable from the broader community, by virtue of the manner in which belief is translated into daily custom (such as dress and dietary practices) and socioeconomic life (such as housing patterns and participation in particular types of economic enterprises). In this way, religion, like race, renders groups and individuals vulnerable to discrimination.

Furthermore, it is sometimes impossible to separate the religious elements from "racial" or "ethnic" components of group identity.⁹³ This difficulty is illustrated by a case in which the Norwegian Supreme Court reviewed a conviction for the circulation of leaflets that vilified Norwegian immigration policy regarding Islamic foreign workers, Islamic immigrants themselves

employment rights, including, inter alia, remuneration, leave with pay and retirement privileges, to be guaranteed, by all appropriate measures, on a basis of equality with men. *See also* Racial Discrimination Declaration, *supra* note 64, Art. 3 (citing areas in which states should make particular efforts to prevent discrimination). Of course, the obligations in the Discrimination Against Women and Racial Discrimination Conventions are elaborated in even greater detail than are the provisions of the two declarations.

The 1964 Commission Draft Declaration, *supra* note 3, did list fields of activity and specific rights, such as the right to take part in government, as to which "particular efforts" must be made to eliminate discrimination (Art. IV(2)). In subsequent drafting discussions, proposals to incorporate references to specific areas in which states should make particular efforts to eliminate discrimination were rejected. *See, e.g.*, 1980 UN ESCOR Supp. (No. 3) at 110, UN Doc. E/1980/13 (listing employment and civil rights, access to citizenship, and the enjoyment of such political rights as participation in elections). Employment rights were singled out for attention in many of these proposals. *See, e.g., id.* at 110-11. Objections to enumerating specific rights were based on the opinion that a partial listing would suggest that states need not exert efforts to eliminate discrimination with regard to rights not mentioned. *See* UN Doc. A/C.3/SR.2013, at 8-9 (1973); Observations of Governments, *supra* note 17, at 14; UN Doc. E/3925, Annex, at 2 (1964).

⁹¹ *See* UN Doc. E/CN.4/1987/SR.23, at 2, 7-8; 1987 Ribeiro report, *supra* note 9, at 3; Odio Benito report, *supra* note 11, at 46. At the 1984 Geneva Seminar, participants emphasized that "on many occasions, religion and not language [is] the primary factor in the preservation of the identity and the unity of a group." 1984 Geneva Seminar, *supra* note 77, at 9.

⁹² *See* UN Doc. E/CN.4/Sub.2/1985/SR.18, para. 17 (statement by Egyptian representative characterizing Baha'ism as "a faith or opinion" and not a religion, since Baha'is are "Iranian by race and by culture"); *see also* F. CAPOTORTI, STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES, UN Doc. E/CN.4/Sub.2/384/Rev.1, at 43, UN Sales No. E.78.XIV.1 (1979).

⁹³ For example, Special Rapporteur Ribeiro received allegations that ethnic Turks in Bulgaria have been persecuted on religious grounds, by means including the penalization of Islamic religious practices, the destruction of Muslim graveyards and mosques, and employment discrimination. The Government of Bulgaria, however, has refused to acknowledge the Turkish ethnic nature of the Muslim community of Bulgaria and has denied that there is a Turkish minority there. 1988 Ribeiro report, *supra* note 10, at 4, 8, 18.

For an example of processes by which religious communities themselves determine membership within the community, see Elon, *The Ethiopian Jews: A Case Study in the Functioning of the Jewish Legal System*, 19 N.Y.U. J. INT'L L. & POL. 535 (1987).

and the Islamic religion.⁹⁴ The author of the leaflets had treated the religious beliefs of the immigrants as the hallmark of their racial and ethnic identity and had explicitly invoked racial categories and racist attitudes.⁹⁵ In concluding that the vilification of the behavior and character of the immigrants exposed them to hatred and contempt and was therefore punishable under Norwegian penal law, the Court explained that the denigrating statements "hit out at a group which is easily identifiable, and which, on account of its alien nature, is particularly vulnerable to contempt and prejudice."⁹⁶

The difficulty of disentangling racial or ethnic characteristics from religious ones should not result in the denial of protection. In two recent cases, the United States Supreme Court rejected the argument that Jews and Arabs cannot invoke the protection of civil rights statutes because those measures apply only to racial discrimination and Jews and Arabs are not racial, but religious or ethnic, groups. In *Saint Francis College v. Al-Khazraji*⁹⁷ and *Shaare Tefila Congregation v. Cobb*,⁹⁸ the Court noted that the concept of "race" is fluid, and has been extended to national origin or mere common ancestry.⁹⁹ Concluding that Jews and Arabs were among those considered at the time the civil rights statutes were drafted to be distinct "races," the Court stated that a distinctive physiognomy is not essential to qualify for protection under the statutes.¹⁰⁰

By acknowledging the fluidity of the concept of "race," this approach takes account of the interrelationship of racial, religious and ethnic identities. Indeed, physiological traits, linguistic traditions, religious beliefs, and the distribution of political and economic power—all may contribute to the formation of racial identity as defined by members of the group, and as perceived by the surrounding society. Concepts of "race" have varied his-

⁹⁴ The case was reported to the UN Committee on the Elimination of Racial Discrimination (CERD). See Judgment No. 134 B/1981, reprinted in UN Doc. CERD/C/107/Add.4, at 14 (1984).

⁹⁵ *Id.* at 20–21.

⁹⁶ *Id.* at 24. In connection with the Norwegian judgment, members of CERD discussed whether Article 1 of the Racial Discrimination Convention applies to religious discrimination. Some members believed attacks on identifiable ethnic or national groups would breach the Convention but attacks on a specific religion would not. Others disagreed, stating that good grounds could be found for extending the Convention to cover attacks against religion. 39 UN GAOR Supp. (No. 18), para. 509, UN Doc. A/39/18 (1984).

Special Rapporteur Ribeiro has recommended that the procedures established by CERD be used to monitor the implementation of international standards concerning questions of discrimination or intolerance in matters of religion or belief. 1988 Ribeiro report, *supra* note 10, at 28. In a similar vein, the Government of Ecuador submitted the following statement in response to the request for information on national legislation regarding freedom of religion or belief: "if any person in Ecuador considers that his rights [as stated in the Declaration] are being jeopardized . . . , he may put his case before the Ecuadorian courts or before the Committee on the Elimination of Racial Discrimination . . . " (emphasis added). UN Doc. E/CN.4/1988/43/Add.1, at 8.

⁹⁷ 107 S.Ct. 2022 (1987).

⁹⁸ 107 S.Ct. 2019 (1987).

⁹⁹ *Al-Khazraji*, 107 S.Ct. at 2026–28.

¹⁰⁰ *Id.* at 2028. See also H. SANTA CRUZ, RACIAL DISCRIMINATION 4–5, UN Doc. E/CN.4/Sub.2/307/Rev.1, UN Sales No. E.76.XIV.2 (rev. ed. 1977) (regarding the relationship between racial and religious discrimination).

torically with socioeconomic changes and among different political systems. The characterization of "race" as a biological construct has been criticized by scientists, who argue that racial classifications are primarily sociopolitical, and not biological, in nature.¹⁰¹

In addition, protections for the rights of religious groups have been discussed in the United Nations under the rubric of minority protections.¹⁰² Concern for the rights of religious groups *qua* minorities, the protean nature of the concept of "race" and the often central role of religion in forming ethnic identities point to the need for thorough and specific safeguards against discrimination on the basis of religion or belief. Activities to promote the aims of the Declaration, to investigate compliance with its standards and to guide its implementation should stress this need. If a convention is drafted, detailed antidiscrimination provisions applicable to such critical areas as employment and education should be included.

IV. NORMATIVE CONFLICTS INVOLVING THE DECLARATION

Conflicts that arise between the rights stated in the Declaration and other human rights may be best addressed by identifying those factors significant to a balancing of the rights and interests involved, rather than by relying upon ill-defined concepts of hierarchically ordered norms.¹⁰³ A balancing approach that takes into account particularized facts concerning those factors generally relevant to conflict situations can provide a framework for resolving conflicts between norms.

One of the primary factors to be assessed is the significance of a particular religious practice to the underlying religion or belief. A second, conversely, is the importance of the countervailing, nonreligious practice or interest to the right upon which it is premised. Third, the duration of the restrictions must be considered.¹⁰⁴ A final factor to be analyzed is the degree to which each practice interferes with the other or with the underlying rights and interests; that is, does the conflict result in only a slight degree of interfer-

¹⁰¹ See, e.g., S. GOULD, *THE MISMEASURE OF MAN* (1981); A. MONTAGU, *MAN'S MOST DANGEROUS MYTH* (1974); *SCIENCE AND THE CONCEPT OF RACE* (M. Mead, T. Dobzhansky, E. Tobach & R. Light eds. 1968). On the difficulty of defining and identifying racial groups for purposes of human rights instruments, see UN Doc. E/CN.4/Sub.2/1984/31, at 4. Regarding the related question of the definition of "minority" under Article 27 of the Political Covenant, see Sohn, *The Rights of Minorities*, in Henkin (ed.), *supra* note 22, at 276-82; F. CAPOTORTI, *supra* note 92, at 5-12.

¹⁰² See, e.g., UN Docs. E/CN.4/1987/SR.23, at 7; E/CN.4/1987/SR.46, at 10. See also UN Doc. E/CN.4/1987/WG.5/WP.1 (compilation of proposals on the definition of "minority" in connection with the deliberations of the working group considering drafting a declaration on the rights of persons belonging to national, ethnic, religious and linguistic minorities). But see T. VAN BOVEN, *supra* note 22, at 272 (regarding problems associated with the special protection of religious liberty under a minority system).

¹⁰³ For a discussion of the concept of hierarchy and conflicts, see text at notes 45-49 *supra*.

¹⁰⁴ See A. KRISHNASWAMI, *supra* note 1, at 36.

ence, or is either of the practices totally barred and the exercise of the underlying rights extensively restricted or foreclosed?¹⁰⁵

Such assessments should eschew, as far as possible, inquiries into whether a practice is legitimately religious in nature, since such judgments may impose majoritarian values concerning the features characteristic of "bona fide" religions upon beliefs that do not share those traits.¹⁰⁶ Evaluation of the relationship between a religious practice and the substantive content of doctrine or belief should not extend beyond a determination that a significant relationship between belief and practice does exist.

A similarly particularized analysis is appropriate in assessing state-imposed restraints upon the freedom to manifest religion that are based on the other grounds listed in paragraph 3 of Article 1. Krishnaswami has emphasized the impossibility of identifying legitimate restrictions in the abstract. Nonetheless, he has suggested that some manifestations of religion or belief are "so obviously contrary to morality, public order, or the general welfare that public authorities are always entitled to limit them or even to prohibit them altogether."¹⁰⁷ Practices such as human sacrifice, self-immolation, mutilation of oneself or others, and reducing others to slavery or prostitution may thus be restricted without constituting discrimination against the perpetrators because the restrictions are "founded in the superior interests of society."¹⁰⁸ Certain practices, like human sacrifice, are clearly subject to restriction and prohibition, but such restrictions should be based upon the rights and freedoms of others, rather than the "superior interest of society." Because the concept of the "superior interest of society" unjustifiably assumes that the diverse groups within society subscribe to a homogeneous value system, it is preferable to ground the necessary prohibition of such practices as human sacrifice in the rights and freedoms of others.

¹⁰⁵ In the case of the discriminatory employment practice described in the text at note 48 *supra*, the relevant questions include: How significant is the practice of barring women from certain jobs to the religious doctrine or tradition? How important is women's access to those jobs to the elimination of employment discrimination? What is the relationship between the discriminatory employment practice and the larger goal of eliminating discrimination in all sectors of society? Does the employment bar apply to all jobs or only a few positions within the business? Is it a permanent, year-round restriction, or one that applies temporarily or only at certain times of the year?

For an example of the resolution of such conflicts under U.S. law, see *Bollenbach v. Monroe-Woodbury Cent. School Dist.*, 659 F.Supp. 1450 (S.D.N.Y. 1987) (holding that the school district's refusal to assign women bus drivers to routes serving Hasidic male students, as an accommodation to the Hasidic belief in strict separation of the sexes, violates both the First Amendment and title VII of the 1964 Civil Rights Act). See also *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986) (holding that a city plan to provide physically segregated accommodations, instruction in English as a second language and only female teachers for female Hasidic students within a public school attended primarily by Latino children violated the First Amendment).

¹⁰⁶ See, e.g., *NEW SOUTH WALES ANTI-DISCRIMINATION BOARD*, *supra* note 19, at 202-26 (regarding controversy over the religious status of beliefs held by certain minority religions such as the Scientologists).

¹⁰⁷ A. KRISHNASWAMI, *supra* note 1, at 43. ¹⁰⁸ *Id.*

Conflicts Involving Children's Rights

Given the need for particularized evaluation of conflicts under the Declaration, a provision intended to regulate them would probably be of limited utility.¹⁰⁹ Some conflicts arising within the context of the Declaration itself, however, might have been avoided in the drafting process, as illustrated by the potential for conflict between Article 5 and other provisions.¹¹⁰ Article 5 provides that the parents (or legal guardians) have the right to organize family life in accordance with their religion or belief and that children have a right of access to a religious education that is consistent with the wishes of their parents. Decisions concerning children's education in religion or belief are to be guided by the "best interests of the child"¹¹¹ (paragraph 2). The only restriction upon the control that parents (or other custodians) may exercise over their children's upbringing in matters of religion or belief is an injunction against practices that are "injurious to [their] physical or mental health or to [their] full development" (paragraph 5).

¹⁰⁹ Cf. Draft Principles, *supra* note 1, pt. IV(1), providing that "[i]n the event of a conflict between the demands of two or more religions or beliefs, public authorities shall endeavor to find a solution reconciling these demands in a manner such as to ensure the greatest measure of freedom to society as a whole."

¹¹⁰ Article 5 states:

1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.

2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.

3. The child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others, and in full consciousness that his energy and talents should be devoted to the service of his fellow man.

4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief, the best interests of the child being the guiding principle.

5. Practices of a religion or beliefs in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account article 1, paragraph 3, of the present Declaration.

¹¹¹ Cf. Declaration of the Rights of the Child, Principle 7, GA Res. 1386, 14 UN GAOR Supp. (No. 16) at 19, UN Doc. A/4354 (1959). The second paragraph of Principle 7 provides that "[t]he best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents." In contrast, Article 18(4) of the Political Covenant, *supra* note 7, makes no reference to considerations other than the convictions held by parents or guardians: "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."

Because the Declaration fails to define "child" or to specify the age at which children are entitled to decide matters of religion or belief for themselves, parental rights under the Declaration may conflict with their children's rights if the children's preferences in these matters differ from those of their parents.¹¹² Such conflicts are not reconcilable under the limitations imposed by Article 5 unless the practices or beliefs urged by the parents are injurious or detrimental to the children's "full development."

Parental rights concerning children's religious education and upbringing should be construed primarily as the responsibility to safeguard children's religious freedoms.¹¹³ By citing the duties to shield children from discrimination, injurious practices and beliefs, and compulsory religious education against parental wishes, the Declaration places the rights of children within the framework of special protections for children as articulated in other human rights instruments.¹¹⁴ The proscription of practices harmful to children's health and "full development" clearly expresses this protective posture and reflects the drafters' concern that religious practices endorsed by parents, such as the refusal of blood transfusions, could threaten children's health or even survival.¹¹⁵

Although Article 5 reflects the laudable desire to deter interference by the state or attempts to convert children, especially orphans, from the beliefs held by their parents,¹¹⁶ it generates considerable potential for conflict between parental rights and children's rights to freedom of religion or belief. In such conflicts, the child's right to freedom of belief should be weighed against parental rights under Article 5, in an analysis that con-

¹¹² The failure to address the rights of children themselves was noted during drafting discussions. See, e.g., UN Doc. A/C.3/SR.2011, at 15 (1973) (comments by the representative of Japan). See also Observations of Governments, *supra* note 17, at 17 (response by the Government of Sweden).

Regarding the need to define "child" or to specify the age at which a child is entitled to make decisions concerning religion or belief, see, e.g., UN Docs. A/C.3/SR.2010, at 9 (1973); A/C.3/SR.2013, at 9-11 (1973); E/CN.4/1146/Add.3, at 4 (1974); and Observations of Governments, *supra*, at 17.

The Human Rights Committee has raised questions concerning the age at which children have the right to exercise the freedom of religion or belief under the Political Covenant. See, e.g., 36 UN GAOR Supp. (No. 40) at 76, UN Doc. A/36/40 (1981); 37 UN GAOR Supp. (No. 40) at 15, UN Doc. A/37/40 (1982).

For an example of situations in which such conflicts may arise, see UN Doc. E/CN.4/1988/43/Add.1, at 8 (summary of the membership rules of the established Church of Denmark, giving children between the ages of 15 and 18 the right to join or resign from the church if the child's custodian provides a declaration of consent).

¹¹³ For a proposed formulation of Article 5 stressing parental responsibility, see UN Doc. E/CN.4/1146/Add.3, at 4 (1974).

¹¹⁴ See, e.g., Declaration of the Rights of the Child, *supra* note 111; Political Covenant, *supra* note 7, Art. 24; International Covenant on Economic, Social and Cultural Rights, Art. 10(3), GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966).

¹¹⁵ See UN Doc. E/3925/Add.1, at 6-7 (1964) (asserting the need for a proscription upon exposing children to harmful religious practices in light of such phenomena as substituting a "laying on of hands" for medical treatment); see also 1981 UN ESCOR Supp. (No. 5) at 141, UN Doc. E/1981/25.

¹¹⁶ See generally A. KRISHNASWAMI, *supra* note 1, at 39-40; Liskofsky, *supra* note 3, at 481.

siders, inter alia, the child's age and maturity,¹¹⁷ the nature of the practice or belief at issue, and any influence or coercion exercised upon the child by sources outside the family. The potential for such conflict might have been lessened had Article 5 specified the age at which children may decide matters of religious practice and belief for themselves,¹¹⁸ or required states to prescribe an age of majority for these matters in national legislation.¹¹⁹ It may therefore be worthwhile for the drafters of a future convention to address this question.

Religious Law and Human Rights Law

Although the rights to establish religious courts and administer religious law are not stated in the Declaration, religious tribunals and the implementation of religious law are manifestations of religious belief to which the protections of Article 1 should apply.¹²⁰ Nevertheless, the extent to which religious law may be administered without restrictions by the state or without limitations derived from other human rights obligations may vary with the substantive content of the law itself, and with the scope of the subject matter and personal jurisdiction vested in the religious courts.

Religious law may incorporate elements hostile to various human rights, infringing upon those rights to differing degrees. At one end of the spectrum, for example, may be dress codes for women that have the effect of reinforcing societal beliefs that relegate women to inferior status in public life. At the other end of the continuum are the extreme violations of such rights as the freedom from torture and the right to life by practices such as mutilation and *suttee*. Other conflicts between religious tenets and human rights fall at different points along this spectrum. For example, rules of procedure, such as evidentiary laws that assign lesser weight to testimony by women, may infringe substantive rights by impairing the ability to obtain

¹¹⁷ The working group on a draft convention on the rights of the child has discussed the need for a general provision regarding the "evolving capacities of the child," or a reference to those capacities in articles addressing particular rights. UN Doc. E/CN.4/1987/25, at 24-27.

¹¹⁸ See, e.g., Convention on Consent to Marriage, Art. 2, *opened for signature* Dec. 10, 1962, 521 UNTS 231 (entered into force Dec. 9, 1964) (national legislation shall specify a minimum age for marriage).

¹¹⁹ For an example of national legislation regulating children's rights to exercise religious freedoms, see the discussion of the Religious Education Act of Austria, in UN Docs. CCPR/C/6/Add.7, at 27-28 (1981); E/CN.4/1988/43/Add.1, at 3. Under the Act, parents may determine the religion of their children until they are 12 years old, at which time the children may no longer be given against their will a religious education different from that previously received. At age 14, children have the right to decide for themselves what their religion will be, and state authorities must protect their choices if necessary. See also 41 UN GAOR Supp. (No. 40) at 44, UN Doc. A/41/40 (1986) (discussion of Finnish legislation under which children belong to the religious community of their parents until age 15, when they may join another religious community if they so desire); 36 UN GAOR Supp. (No. 40) at 76, UN Doc. A/36/40 (1981) (questions raised by the Human Rights Committee regarding provision in Norwegian Constitution giving children over the age of 15 the right to join or resign from the Church of Norway).

¹²⁰ T. MERON, *supra* note 45, at 155-56; F. CAPOTORTI, *supra* note 92, at 70-71.

legal protection for those rights. Attempts to resolve conflicts between religious law and human rights norms may be fruitless where religious doctrine insists upon the immutability of the sacred law or its supremacy over human rights norms.¹²¹

A major area of conflict between religious law and human rights law is that of women's rights. Conflicts between the norms contained in the Declaration and those appearing in the Discrimination Against Women Declaration and Convention are inevitable.¹²² The formal requirements of religious law, interpretations of that law and social custom derived from it may all infringe women's rights. Analyses of specific situations of conflict should take account of the sometimes substantial divergence between legal theory and practice and of factors such as the effect of class distinctions among women within the same religious community.¹²³ However, certain broad principles relevant to the principal types of conflicts can usefully be delineated. Religious tenets governing rights associated with the life of the family, particularly those pertaining to marriage and divorce, inheritance and personal status, frequently set religious law in opposition to the prohibition of discrimination against women. Compare, for example, Articles 5 and 10(c) of the Discrimination Against Women Convention with Article 5(2) of the Declaration.¹²⁴ In some cases, religious law governing family relations and personal status in their entirety, and not merely particular practices, may be inconsistent with the basic concept of women's equality.¹²⁵

¹²¹ See generally UN Doc. E/CN.4/Sub.2/1987/35; 37 UN GAOR Supp. (No. 40) at 66-67, 72, UN Doc. A/37/40 (1982) (regarding the applicability of the principles underlying the Universal Declaration to Islamic societies). See, e.g., UN Docs. A/C.3/36/SR.29, at 6 (1981); A/C.3/37/SR.67, at 9-11 (1982) (asserting the supremacy of Islamic law over international human rights norms governing the death penalty).

¹²² Greenberg, *supra* note 61, at 330. For example, the freedom to teach a religion or belief (Art. 6(e)) may conflict with obligations under the Discrimination Against Women Convention if religious doctrine incorporates ideas based on stereotyped roles for the sexes or denies women admission to religious training academies. See, e.g., UN Doc. E/1987/L.20, at 21-22, 25.

¹²³ See, e.g., M. HOOKER, *ISLAMIC LAW IN SOUTH-EAST ASIA* 34-35 (1984) (observing that with regard to Southeast Asia, evidence is conflicting on the extent to which Islamic law can be considered an accurate expression of actual legal practice and that analysis of the evidence depends upon what is meant by "Islam").

¹²⁴ Article 5 of the Discrimination Against Women Convention, *supra* note 43, requires states to take appropriate measures to modify social and cultural patterns and practices based on stereotyped roles for men and women. In education, Article 10(c) calls for the elimination of "any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation . . . [and] by the revision of textbooks and school programmes." Under Article 5(2) of the Declaration, however, children should not be compelled to receive teaching intended to eliminate stereotyped gender roles if such stereotyped roles are a feature of the belief system in which their parents wish to educate them.

¹²⁵ For example, Egypt has entered a reservation to Article 16 of the Discrimination Against Women Convention, *supra* note 43 (concerning the equality of men and women in all matters relating to marriage and family matters), which emphasizes the "sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called into question." 39 UN GAOR Supp. (No. 45), para. 190, UN Doc. A/39/45 (1984). In reviewing this reservation, members of the Committee on the Elimination of Discrimination Against

Article 15 of the Discrimination Against Women Convention guarantees women equality with men before the law and legal capacity identical to that of men in civil matters, but the status of women before religious tribunals or secular courts applying religious law is not clarified by this guarantee.¹²⁶ Religious laws governing personal status obviously determine not only the religious rights of women, but also important legal rights, including those regulating economic resources.¹²⁷ Under the Shiite law of inheritance, as incorporated in Iranian law, for example, a husband inherits his share of his wife's estate without any distinction between real and movable property. In contrast, a widow cannot inherit any real property but receives only her share of the value of the buildings and household effects (not a share of the buildings and effects themselves).¹²⁸

Discriminatory measures regulating marriage and divorce may impose strictures affecting women's position, both within and beyond the religious community, that are as inimical to women's equality as are measures directly

Women (CEDAW) queried whether "complementarity" and equivalency of rights between men and women under Islamic law were being equated with the concept of equality. *Id.* at 26. At its sixth session, CEDAW asked the United Nations "to promote or undertake studies on the status of women under Islamic laws and customs and in particular on the status and equality of women in the family on issues such as marriage, divorce, custody and property rights and their participation in [the] public life of the society." UN Doc. E/1987/L.20, at 88-89. *See also* UN Doc. CEDAW/C/L.3/Add.28 (1988) (clarifying the reasons for this request in response to criticisms voiced in the General Assembly and ECOSOC).

See also UN Docs. A/C.3/37/SR.56, at 16 (1981) (statement by Iranian representative characterizing provisions in the Universal Declaration and the Covenants regarding matters such as marriage as violations of the freedom to practice one's religion or belief); CCPR/C/SR.203, at 7-8 (1980) (statement by Iraqi representative asserting that personal status laws must be in conformity with the *Shari'a*).

¹²⁶ T. MERON, *supra* note 45, at 79. Article 6 of the Discrimination Against Women Declaration, *supra* note 82, calls for measures to ensure for women equal rights with men under civil law, including equality in legal capacity and equal rights to acquire, administer and inherit property, but qualifies this guarantee with the excessively vague caveat that such measures must be "[w]ithout prejudice to the safeguarding of the unity and the harmony of the family."

¹²⁷ On the status of women in Islamic family law, see generally J. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* (1982). On Islamic family and personal status law, see generally J. NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* (1986); K. HODKINSON, *MUSLIM FAMILY LAW: A SOURCEBOOK* (1984). *See, e.g.*, UN Doc. E/1987/L.20, at 81-84 (regarding the effect of *Shari'a* personal status law in matters such as land tenure and inheritance, and the importance of control over land, as the basic resource, in rural Bangladesh).

¹²⁸ J. NASIR, *supra* note 127, at 223-24. *See generally* D. POWERS, *STUDIES IN QUR'AN AND HADITH: THE FORMATION OF THE ISLAMIC LAW OF INHERITANCE* (1986). The Unified Arab Draft Law for Personal Status, recently completed by the Ministerial Committee of the First and Second Congresses of the Arab Ministers of Justice, incorporates similarly discriminatory inheritance provisions. Under Article 251, for example, a husband receives one-half of his wife's estate if she has no descendants, while Article 252 provides that a wife receives only one-quarter of the husband's estate if he has no descendants. *Id.* at 304.

See, e.g., UN Doc. CCPR/C/SR.730, at 11 (1987) (statement by member of the Human Rights Committee characterizing Art. 91 of Iraq's Personal Status Act, concerning inheritance by daughters, as discrimination on the basis of sex). Inheritance provisions of this type appear to conflict with Article 6(a) of the Discrimination Against Women Declaration, *supra* note 82, which calls for women's right to inherit property on a basis of equality with men. *See, however*, note 126 *supra*.

restricting access to material resources. It has been suggested that the refusal to grant a religious divorce to a woman for reasons involving sex discrimination would not violate Article 15 of the Convention (mandating equality before the law) unless her ability to obtain a civil divorce was impaired by that refusal.¹²⁹ Yet consider the example of a Jewish wife whose husband withholds the bill of divorce (the *get*) required by Jewish law. Under Jewish law, a divorce is not final until the husband presents his wife with a *get* before a rabbinical court.¹³⁰ An observant Jewish woman who is neither living with her husband nor divorced under Jewish law cannot remarry, because without a *get*, the second relationship would be adulterous, and any children born of the remarriage would be considered illegitimate.¹³¹ Such formidable disabilities render the availability of a civil divorce inconsequential for those women who wish to remain within the religious community.

The availability of secular remedies does not obviate the need to eliminate sex discrimination within religious law and practice. To conclude otherwise would require women, in effect, to choose between freedom from discrimination and participation in the religious community.¹³² Some state legislatures in the United States have attempted to remedy the situation of observant Jewish women whose husbands will not grant them a religious divorce by making the religious divorce a precondition for the acquisition of a civil divorce. These efforts have been characterized by some observers as secular resolutions of a religious inequity that properly demands a religious remedy.¹³³

Beyond the areas of substantive conflict, like women's rights, the operation of religious law must be circumscribed by an important principle limiting its secular effects and jurisdictional scope: namely, that where civil effect is accorded to religious laws, religious ceremonies and the decisions of religious tribunals, religious tribunals should not have personal jurisdiction over individuals who are not adherents of the faith represented by the tribunal.¹³⁴

¹²⁹ T. MERON, *supra* note 45, at 157.

¹³⁰ MAIMONIDES, *Sefer Nashim, Hilkot Gerushin* 1:1, in MISHNEH TORAH (O. Yosef & S. Frankel pubs. 1977); see generally R. BIALE, WOMEN IN JEWISH LAW: AN EXPLORATION OF WOMEN'S ISSUES IN HALACHIC SOURCES 70-101 (1984).

¹³¹ MAIMONIDES, *supra* note 130, *Sefer Kedusha, Hilkot Issurai Biah* 15:1; R. BIALE, *supra* note 130, at 101-13.

¹³² For a historical review of women's participation in religious communities in the United States, see 1-3 WOMEN AND RELIGION IN AMERICA (R. Ruether & R. Keller eds. 1981, 1983, 1986).

¹³³ See, e.g., N.Y. DOM. REL. LAW §253 (McKinney 1986); see also R. BIALE, *supra* note 130, at 99, 111-12; Meislin, *Pursuit of the Wife's Right to a 'Get' in United States and Canadian Courts*, 4 JEWISH L. ANN. 250 (1981). In recognition of the importance of reform from within the religious community, the New York Board of Rabbis recently called upon rabbis to apply sanctions against former husbands who refuse to grant religious divorces and to urge couples to sign prenuptial agreements stating that in the event of civil divorce they will grant a religious divorce. American Jewish Committee, Press Release No. 87-960-160, July 22, 1987, at 3.

¹³⁴ For a discussion of circumstances in which Jewish law concerning personal status may be applied to non-Jews, see Shava, *The Rabbinical Courts in Israel: Jurisdiction over Non-Jews*, 27 J. CHURCH & ST. 99 (1985).

In a multireligious state that recognizes the concurrent or exclusive jurisdiction of religious tribunals over personal status or other matters, a system of coexisting religious courts with personal jurisdiction over the members of their respective communities in these matters may arise.¹³⁵ If such states have no secular law of personal status, atheists or agnostics, as well as adherents of religions that are not recognized by the state or that have no religious tribunals, may be bound by legal standards contrary to their belief as a result of jurisdictional gaps.¹³⁶ Jurisdictional conflicts between different religious tribunals, like those occurring in a legal dispute between spouses in an interfaith marriage, may pose similar threats to the individual's religious and other rights. Gaps in the subject matter jurisdiction of secular courts may thus prove restrictive rather than protective of religious freedoms.¹³⁷

V. CONCLUDING OBSERVATIONS

This overview of the Declaration suggests that certain protections not included among its provisions may be necessary to guarantee those freedoms that are established, and that several of its provisions are cast in somewhat broad or vague language. If a convention is prepared at some time in the future, the challenge for the drafters will be to incorporate provisions that overcome these problems while retaining the positive elements of the Declaration. Among the key changes that seem necessary are a narrowing of the grounds on which states would be permitted to restrict manifestations of religion or belief; the elaboration of antidiscrimination measures; and the addition of provisions on remedies, reporting obligations and means for the international scrutiny of the respect accorded the rights concerned and their implementation. There is also a need to clarify the status of religious courts, i.e., the extent to which they represent a protected manifestation of the freedom to practice religion and the extent to which they must comply with such human rights obligations as the prohibition of discrimination on the basis of sex.

The Declaration stands as a major advance in the development of international norms governing the subjects that it addresses. The lengthy process leading to its adoption testifies to the complexity and sensitivity of the issues raised by these subjects.¹³⁸ New standard-setting efforts in this field should

¹³⁵ See, e.g., R. EISENMAN, *ISLAMIC LAW IN PALESTINE AND ISRAEL* (1978). For example, in Israel, some personal status matters lie within the exclusive jurisdiction of the religious courts of the recognized religious communities and others are within the concurrent jurisdiction of the religious courts and the civil district courts. Shava, *supra* note 134, at 99, 101-02.

Jurisdictional conflicts between secular courts and religious courts may arise under systems of concurrent jurisdiction. See, e.g., UN Doc. E/1987/L.20, at 74, 77 (regarding possible conflict between the canonic law and the civil law of marriage and divorce enacted in Colombia). See also H.C. 301/63, *Schtreit v. Chief Rabbi of Israel*, 18(1) *Piskei Din* 598, 608 (1964); H.C. 232/81, *Vilozni v. Rabbinical Court*, 36(2) *Piskei Din* 733, 738 (1982) (stating the rule that the Supreme Court of Israel will not sit in appeal over the decisions of the religious courts).

¹³⁶ See, e.g., Shava, *supra* note 134.

¹³⁷ See A. KRISHNASWAMI, *supra* note 1, at 53.

¹³⁸ 1988 Ribeiro report, *supra* note 10, at 25.

be approached with caution. The special rapporteur for the Commission on Human Rights has recommended the establishment, within the Commission, of an open-ended working group to consider the possibility of preparing a convention.¹³⁹ Although some governments have endorsed the creation of an open-ended working group charged with preparing a draft convention,¹⁴⁰ several others have voiced opposition to this course on the grounds that it would divert attention and resources from the activities of the Commission's special rapporteur and undermine the status of the Declaration itself.¹⁴¹

A convention would offer the obvious advantage of creating binding legal obligations, a particularly significant advance for those states that lack adequate constitutional or legislative protections for the rights and freedoms in question. Moreover, as noted by the Commission's special rapporteur, "the mandatory nature of the provisions of such an instrument would impose on States Parties a number of requirements, such as the submission of reports on the application of its provisions, which might encourage greater respect for religious rights and freedoms by such States."¹⁴²

A major factor militating against the advisability of undertaking new standard setting in the near future is the danger of weakening the considerable normative force of the Declaration. Since in many countries religious freedoms are viewed as analogues of political rights and therefore sometimes as suspect, it is possible that a consensus could not be achieved for standards even higher than those provided by the Declaration and that only a less protective instrument could be adopted. A binding instrument, however, should raise the level of protection, building on the principles set forth in the Declaration, and drawing on the information and experience gained through the special rapporteur's activities and the implementation procedures established under the Political Covenant and the Racial Discrimination Convention (since the latter instruments address areas relevant to the Declaration).¹⁴³

Certainly, the preparation of a convention would prove a protracted endeavor. If an open-ended working group is created for this purpose, the implementation activities of the Commission's special rapporteur should continue with unabated support. Efforts to promote the Declaration through public education should be encouraged and a prominent role in those efforts should be assumed by nongovernmental organizations and religious communities. Information gathered by the special rapporteurs of the Commission (Ribeiro) and the Sub-Commission (Odio Benito) can pro-

¹³⁹ *Id.*

¹⁴⁰ See UN Docs. E/CN.4/1988/44, at 4; E/CN.4/1988/44/Add.3.

¹⁴¹ See, e.g., UN Docs. E/CN.4/1988/44/Add.2, at 2; E/CN.4/1988/44, at 3-4.

¹⁴² 1988 Ribeiro report, *supra* note 10, at 25.

¹⁴³ Special Rapporteur Ribeiro has recommended that attention be given to utilizing the "machinery now available for monitoring the implementation of international standards concerning questions of discrimination or intolerance in matters of religion or belief [, including the procedures established by] the Committee on the Elimination of Racial Discrimination and the Human Rights Committee." *Id.* at 28.

vide valuable guidance for devising the legal protections and educational measures most likely to be effective in eradicating religious discrimination and violations of the freedom of religion and belief.

Given the risks associated with undertaking the preparation of a binding instrument, a focus on improving means to implement the Declaration may be the better course at this time. For example, the General Assembly might create a reporting system and authorize the Economic and Social Council to set up a working group to review those reports and to continue the monitoring and investigatory activities begun by the two special rapporteurs. Indeed, the Commission might consider assigning these activities, rather than drafting responsibilities, to a working group of its own.

Should the work on a convention proceed, those who seek to ensure religious rights and freedoms must avoid politicization of the issue as far as possible.¹⁴⁴ Only with the support of a large number of countries across a broad sociopolitical spectrum is there reason to hope that the product of the drafting process will be both legally sound and transformed into practice by states parties. Most important, great care must be exercised to ensure that a convention, if one is drafted, does not erode the achievements of the Declaration, and that the Declaration will continue to apply to states that do not become parties to the convention.

¹⁴⁴ See T. VAN BOVEN, *supra* note 22, at 276; UN Doc. E/CN.4/1986/SR.50/Add.1, at 10, 12 (regarding the need for consensus in the area of freedom of religion).

INTERNATIONAL DISCOVERY AFTER AEROSPATIALE: THE QUEST FOR AN ANALYTICAL FRAMEWORK

By David J. Gerber*

When a United States court orders the discovery of information located outside United States territory, it is employing state power "extraterritorially"¹—i.e., to coerce conduct within foreign territory.² Such extraterritorial applications of U.S. discovery rules often conflict with basic principles of justice in the state where the information is located, and they may also harm legally protected interests of that state.³ As a result, extraterritorial discovery has led in recent years to conflicts between the United States and foreign countries that have impaired the effectiveness of U.S. litigation,⁴ imposed unnecessary costs and unfairness on litigants in U.S. courts and interfered with the policies of both the United States and foreign states.⁵

To reduce these conflicts and their concomitant harms, a legal framework must be developed that can effectively accommodate the various public and private interests involved. Both the structure and the substance of this framework must respond to fundamentally new legal problems created by U.S. extraterritorial discovery practices.⁶

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¹ The term "extraterritorial" refers to the location of the required conduct. References to "foreign" or "international" discovery are imprecise, because they do not specify the nature of the nondomestic element. For example, "foreign" discovery may refer to conduct on foreign territory or to some other foreign element such as the nationality of a witness.

² The coercive effect of such an order derives from the expectation that failure to obey the order will lead to the imposition of sanctions. The fact that the order does not itself contain such sanctions does not make it any less coercive.

³ The central conflicts arise from two facts. First, the United States permits the use of state power to *search* for information rather than merely to secure identified information. Second, it authorizes private attorneys to direct this power with minimal judicial supervision. For detailed discussion, see Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745 (1986). For a penetrating comparative analysis of procedural systems, see M. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986).

⁴ For discussion of the development of the problem, see Gerber, *supra* note 3, at 746-47.

⁵ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §442 Reporters' Note 1 (1988) ("No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States") [hereinafter RESTATEMENT (THIRD)].

⁶ Developing such a framework is made particularly difficult by the fact that disputes concerning U.S. discovery procedures generally arise in U.S. courts, and therefore U.S. courts must develop and apply legal principles to resolve international conflicts caused by U.S. policies.

In *Societe Nationale Industrielle Aerospatiale v. U.S. District Court (S.D. Iowa)*,⁷ the United States Supreme Court directly addressed extraterritorial discovery issues for the first time in some 30 years.⁸ Recognizing the need for an accommodation of U.S. and foreign interests, the Court mandated that lower courts permit extraterritorial discovery only after a "particularized analysis" of those interests based on principles of fairness and mutual cooperation. The Court failed, however, to provide an analytical framework that could be used to achieve the goals it established. As a result, the opinion threatens to lead to conceptual chaos and may exacerbate rather than reduce current conflicts.

This article develops an analytical framework designed to achieve the goals established in *Aerospatiale*. It first reviews the *Aerospatiale* opinion, focusing on its decisional mandate to lower courts. It then examines the prerequisites for the effective evaluation of extraterritorial discovery and constructs from the *Aerospatiale* case, as well as from other principles of domestic and international law, a framework for analyzing extraterritorial discovery requests.

I. AEROSPATIALE AND EXTRATERRITORIAL DISCOVERY

The specific issue in *Aerospatiale* was whether litigants in United States courts were required, at least under certain circumstances, to use the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention)⁹ to obtain evidence located within signatory states.¹⁰ In resolving this issue, however, the Supreme Court established certain general principles to be applied to all requests for extraterritorial discovery. The specific issue was thus imbedded in fundamental issues involving the relationships between the U.S. legal system and most other legal systems.¹¹

⁷ *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the S. Dist. of Iowa*, 107 S.Ct. 2542 (1987) [hereinafter *Aerospatiale*].

⁸ The last major Supreme Court case on this issue was *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958).

⁹ Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, done Mar. 18, 1970, 23 UST 2555, TIAS No. 7444, 847 UNTS 231. This treaty was expressly intended to "bridge the gap" between U.S. and foreign procedures by providing mechanisms through which United States courts could acquire evidence located in foreign countries without resorting to U.S. discovery rules.

The most important procedure created by the Convention permits a signatory state to request information from a court in another signatory state, and it establishes an international legal obligation on the requested state to provide the requested information. For discussion, see 1 B. RISTAU, *INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL)* 192-257 (1986).

¹⁰ States that are currently parties to the Convention include: Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, Israel, Italy, Luxembourg, Monaco, the Netherlands, Norway, Portugal, Singapore, Sweden, the United Kingdom and the United States. See 8 MARTINDALE-HUBBELL LAW DIRECTORY 12-21 (1987).

¹¹ Numerous nonparty organizations and countries filed amicus curiae briefs, including the Italy-America Chamber of Commerce, Inc.; the Motor Vehicle Manufacturers Association of

THE FACTS AND OPINIONS

The plaintiffs in *Aérospatiale* were United States citizens who had been injured in a plane crash in Iowa. They sued the manufacturer of the airplane, Société Nationale Industrielle Aérospatiale¹² (Aérospatiale) for injuries resulting from the crash and allegedly attributable to defects in the airplane. Aérospatiale is a French corporation wholly owned by the Government of France.¹³

After initial discovery by both sides pursuant to the Federal Rules of Civil Procedure,¹⁴ a second set of discovery requests by the plaintiff was rejected by defendants, who sought a protective order on the grounds that they were "French corporations, and the discovery sought can only be found in a foreign state, namely France."¹⁵ Defendants argued that any discovery within the territory of France had to be conducted, at least initially, according to the procedures of the Hague Evidence Convention.

Denial of defendants' motion was appealed to the U.S. Court of Appeals for the Eighth Circuit,¹⁶ which affirmed the decision of the lower court.¹⁷ The court of appeals held that the Convention not only was not mandatory, but also was not applicable to persons subject to the jurisdiction of the court.¹⁸

In a five-to-four opinion, the Supreme Court agreed with the lower courts that the Convention was not mandatory and that, therefore, U.S. discovery rules could be used to obtain information located outside the United States.¹⁹ The Court held that the Convention itself neither stated nor implied that it was the exclusive means of obtaining foreign information; nor was there any other basis for finding such an obligation.²⁰ On this issue the

the United States, Inc.; the Product Liability Advisory Council, Inc.; Volkswagen AG; the Federal Republic of Germany; Switzerland; France; the United Kingdom; the United States; and the Securities and Exchange Commission.

¹² A second defendant was the Société de Construction d'Avions de Tourisme[e].

¹³ Defendants apparently did not argue that they were immune from jurisdiction under the doctrine of foreign sovereign immunity. See Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1602-1611 (1982).

¹⁴ Delay in raising the Hague Evidence Convention issue may have caused that argument to appear as something of an afterthought. Moreover, the possibility of cutting off discovery already begun obviously entails potential unfairness to one of the litigants. This also happened in another case on the same issue that had reached the Supreme Court the preceding year. See *In re Anschuetz & Co.*, 754 F.2d 602 (5th Cir. 1985), remanded, 107 S.Ct. 3223 (1987).

¹⁵ *Aérospatiale*, 107 S.Ct. at 2546.

¹⁶ The magistrate denied the motion with respect to all discovery requests, except the request for oral depositions to be taken on French territory. *Jones v. Societe Nationale Industrielle Aérospatiale*, Civ. 82-435 C, App. to Pet. for Cert. 25a (July 31, 1985) (LEXIS, Genfed library, Briefs file).

¹⁷ *In re Societe Nationale Industrielle Aérospatiale*, 782 F.2d 120 (8th Cir. 1986).

¹⁸ *Id.* at 125.

¹⁹ *Aérospatiale*, 107 S.Ct. at 2554.

²⁰ *Id.* at 2553.

Court was unanimous,²¹ and its conclusion reflected the weight of opinion of lower courts²² as well as scholars.²³

The Supreme Court disagreed with the court of appeals, however, on the scope of application of the Convention. The Court held that application of the Convention was not affected by the jurisdictional status of the person from whom information was sought. The Convention was thus applicable both to persons subject to the jurisdiction of the court and to those who were not.²⁴

The remaining issue was whether, and under what conditions, there was an obligation to use the Convention. In answering this question, the Court established the fundamental principle that the use of U.S. discovery procedures to obtain information outside the United States was subject to considerations of comity and fairness.²⁵ Again, the Court was unanimous on this point.²⁶

The Court divided, however, over whether the principle of comity required that the procedures of the Convention be used *before* discovery could be ordered under U.S. law. According to the majority, comity did not require a presumption in favor of first resort to the Convention.²⁷ The Court found no basis for such a requirement, and it expressed concern that such a presumption might "be unduly time-consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules."²⁸ The majority opinion held, therefore, that the use of U.S. discovery rules must be subjected to "prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures [of the Convention] will prove effective."²⁹

The dissent vigorously disagreed. Justice Blackmun argued that international comity required that the Convention be used prior to resort to U.S.

²¹ *Id.* at 2558 (Blackmun, J., dissenting).

²² See, e.g., *Work v. Bier*, 106 F.R.D. 45 (D.D.C. 1985); *International Soc'y for Krishna Consciousness v. Lee*, 105 F.R.D. 435 (S.D.N.Y. 1984); *Slauenwhite v. Bekum Maschinenfabriken GmbH*, 104 F.R.D. 616 (D. Mass. 1985); and *Graco Inc. v. Kremlin, Inc. & SKM*, 101 F.R.D. 503 (N.D. Ill. 1984). But see, e.g., *Schroeder v. Lufthansa German Airlines*, 19 Fed. R. Serv. 2d 211 (N.D. Ill. 1983); and *Pierburg v. Superior Court of Los Angeles County*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982).

²³ See, e.g., Amram, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, 12 ILM 327 (1973); 1 B. RISTAU, *supra* note 9, at 253-55; and McLean, *The Hague Evidence Convention: Its Impact on American Civil Procedure*, 9 LOY. L.A. INT'L & COMP. L.J. 17, 62 (1986). But see Radvan, *The Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters: Several Notes Concerning Its Scope, Methods and Compulsion*, 16 N.Y.U. J. INT'L L. & POL. 1031 (1984); and Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 U. PA. L. REV. 1461 (1984).

For a summary of the foreign and domestic commentary on the exclusivity of the Convention, see McLean, *supra*, at 42-47.

²⁴ *Aerospatiale*, 107 S.Ct. at 2554.

²⁵ *Id.* at 2554-57.

²⁶ *Id.* at 2561-62, 2567 (Blackmun, J., dissenting).

²⁷ *Id.* at 2555-56.

²⁸ *Id.* at 2555.

²⁹ *Id.* at 2556.

discovery rules, except where fairness dictated otherwise.³⁰ He contended that such a presumption was necessary to achieve some degree of predictability about requests for extraterritorial discovery and that an open-ended, unstructured balancing test would lead to unfairness to litigants and harm to the international legal system.³¹

THE COURT'S DECISIONAL MANDATE

The *Aerospatiale* decision requires that trial courts apply a "particularized analysis" of all the facts to requests for extraterritorial discovery. This analysis is to be based on several general principles mentioned in the opinion that identify decision-making objectives.

Comity

The focal point of the mandated analysis is the principle of comity.³² According to the Court, "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."³³ Comity thus requires U.S. courts to evaluate requested extraterritorial discovery in relation to the legitimate interests of foreign states that would be affected.

The Court provided little guidance, however, as to how content is to be ascribed to the principle of comity. The only references in this regard in *Aerospatiale* are to the *Restatement of Foreign Relations Law of the United States (Revised)*.³⁴ The Court stated that the types of factors to be considered in a comity analysis are "suggested" by section 437 of that document,³⁵ which represents the application of the standard of jurisdictional reasonableness to extraterritorial discovery. The list of factors includes items as diverse as "whether the information originated in the United States" and "the extent to which . . . compliance with the request would undermine important interests of the state where the information is located."³⁶

³⁰ *Id.* at 2561-62, 2567-68 (Blackmun, J., dissenting).

³¹ *Id.* at 2569 (Blackmun, J., dissenting).

³² See generally Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9 (1966). The Supreme Court case most often cited for the concept of comity is *Hilton v. Guyot*, 159 U.S. 113 (1895).

³³ *Aerospatiale*, 107 S.Ct. at 2555 n.27.

³⁴ RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Tent. Draft No. 7, 1986). Although the latter version was used by the Court, references below will be to the recently published *Restatement (Third)*, *supra* note 5. For an evaluation of the new provisions concerning extraterritoriality, see Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is "Reasonableness" the Answer?*, 19 N.Y.U. J. INT'L L. & POL. 565 (1987).

³⁵ *Aerospatiale*, 107 S.Ct. at 2555 n.28 (§437 is §442 of the RESTATEMENT (THIRD), *supra* note 5).

³⁶ Section 442 of the RESTATEMENT (THIRD), *supra* note 5, provides, in relevant part:

In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the

When used in conjunction with the Reporters' Notes and in the context of the conceptual framework of the *Restatement*, this section provides useful guidance in analyzing requests for extraterritorial discovery. Without this framework, however, reference to the listed factors is of little value, and the opinion does not indicate that courts should follow the approach of the new *Restatement*.

Fairness to Litigants

The *Aerospatiale* decision also requires courts to consider fairness to litigants in ruling on extraterritorial discovery requests. In particular, the Court required close scrutiny of discovery requests to prevent "abuses" of the discovery rules.³⁷ For example, according to the Court, "American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position."³⁸ The Court did not, however, indicate the relationship of fairness considerations to the comity test, and it gave no guidance as to how fairness was to be analyzed.

Evidentiary Necessity and Procedural Efficiency

While comity and fairness to litigants were presented as factors that might lead a court to restrict the application of U.S. discovery rules, the Court also identified two factors—evidentiary necessity and procedural efficiency—that tend to support application of those rules. In concluding that comity did not require first resort to the Convention, the Court stated that use of the Convention could be rejected where it was likely to be unnecessarily costly and time-consuming and where it might not yield information necessary to the litigation.³⁹ Again, however, the Court did not provide any guidance as to how these concepts were to be applied.

The "particularized analysis" called for by the Supreme Court is thus largely unstructured and exceptionally vague. The Court not only refused to "articulate specific rules to guide this delicate test of adjudication,"⁴⁰ but also failed to provide significant conceptual guidance for the analysis. Although several concepts are mentioned as relevant, they are not presented as part of a coherent framework of analysis. They represent goals of analysis but provide little guidance for courts seeking to achieve them.

information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

The version used by the Court was substantially the same.

³⁷ *Aerospatiale*, 107 S.Ct. at 2556.

³⁸ *Id.* at 2557.

³⁹ *Id.* at 2555–57.

⁴⁰ *Id.* at 2557.

II. CRITERIA FOR AN EFFECTIVE ANALYTICAL FRAMEWORK

The Supreme Court's laconic treatment of the analysis to be applied by lower courts to extraterritorial discovery requests might suggest to some that those courts may consider any interests of any state or party and "balance" them on whatever basis they choose. Such an interpretation of the Court's mandate, however, is likely to preclude attainment of the Court's goals. To achieve them, an analytical framework must be developed that meets two principal criteria. First, it must be sufficiently structured to provide effective guidelines for decision making and thus afford a reasonable degree of predictability. Second, it must be sufficiently comprehensive to include all relevant international as well as domestic law principles and relate to the full range of interests affected by extraterritorial discovery.⁴¹

STRUCTURE AND PREDICTABILITY

The degree of structure in an analytical framework depends on the extent to which there is general agreement among judicial decision makers concerning (1) the content of the legal concepts included in the framework and (2) the relationships among those concepts.⁴² A structured analytical framework thus provides the decision maker with reasonable clarity regarding both of these factors.

As used here, the term "structure" does not imply fixed rules specifying the legal consequences of particular conduct. It refers to the analytical principles that are to be used in making judicial decisions.⁴³ Moreover, owing to the large number of competing interests involved in extraterritorial discovery, fixed rules are not likely to be appropriate for use in that context.

The degree of structure in an analytical framework has three consequences that largely determine its effectiveness regarding extraterritorial discovery orders:⁴⁴ first, it provides guidance for the judge and thus affects

⁴¹ The Court's failure in the opinion to provide a structured framework of analysis does not mean that the Court intended that it be unstructured; the opinion simply does not provide guidance on the issue.

⁴² The assumption here is not that legal concepts have inherent or logically discernible content, or that such concepts can be given fixed and unambiguous content. I do assume, however, that legal processes can and regularly do ascribe content to individual concepts and that this content reasonably can be ascertained by using the methods and conventions of the social institutions in which those processes operate. The so-called deconstructionist critique of legal reasoning does not, therefore, undermine the assumptions on which my analysis is based. For discussion of one version of the deconstructionist view, see Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1725-37 (1976).

⁴³ For discussion of the distinction between rules and principles, see R. DWORKIN, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 14 (1981).

⁴⁴ This assertion does not assume a passive judicial decision maker who is somehow "bound" by the content of the principles. It does assume, however, that conscious application by a judge of a particular set of concepts to a given fact situation will significantly influence the outcome of the decision.

the predictability of judicial decision making;⁴⁵ second, it affects the way lawyers present arguments to courts and the characteristics of those arguments; and third, it influences the conduct of those who may be affected by the court's decision. The higher the degree of decisional predictability, the greater the probable effect on that conduct.⁴⁶

Reducing State-Level Conflict

A structured framework of analysis is likely to reduce incentives for foreign states to obstruct the policy objectives of the United States by enacting or strengthening blocking legislation and by refusing to enforce judgments of U.S. courts. Such measures often stem from fear that foreign interests will not be fully and fairly considered in U.S. courts;⁴⁷ lack of a structured framework is likely to enhance that fear because it suggests that the judge may decide on the basis of subjective and/or possibly biased criteria.

A structured framework not only reduces this perceived subjectivity but also furnishes foreign states with a significant amount of information about the factors that are likely to influence judicial decisions and how those factors will be evaluated. Where the framework requires consideration of foreign interests, for example, the foreign state can be confident that they will be considered, and it can anticipate the analysis that will be applied. This confidence is likely to reduce pressure to enact countermeasures.

Conceptual structure also tends to narrow the range of conflict. It reduces the incentives for foreign states to make broad claims of sovereignty in the hope that a judge may consider some of them convincing. Instead, it encourages states to concentrate their efforts in support of interests that are identified as relevant by the analytical framework, and this, in turn, will tend to clarify and narrow the issues involved in the controversy. Moreover, without such a structure, foreign states may believe that confrontational tactics

⁴⁵ The role of structure in cases involving transnational legal claims must be assessed differently from its role in purely domestic disputes. In the domestic context, those affected by a judicial decision are subject to the authority of the state and cannot take legal action to interfere with the state's regulatory objectives. Moreover, they are presumed to have consented to the authority of the judge, and as members of the polity in which the judge acts they are presumed to be in a position to respond effectively to improper use of judicial discretion. Consequently, the potential adverse impact of ad hoc decision making is minimized.

In the extraterritorial discovery context, however, foreign states can and do take legal measures (e.g., blocking legislation) that obstruct the ability of the United States to accomplish its objectives. Moreover, those states have not consented to the authority of the U.S. judge. As a result, the degree of structure in the applicable analytical framework becomes a critical determinant of the response of foreign states to extraterritorial discovery practices, because it is the central source of information concerning the probable actions of the judge.

⁴⁶ For discussion of the need for predictability in applying comity principles, see Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 93 HARV. L. REV. 1310 (1985).

⁴⁷ See, e.g., Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 COLUM. J. TRANSNAT'L L. 231, 278 (1986); H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 611 (2d ed. 1976); and Wilkey, *Transnational Adjudication: A View from the Bench*, 18 INT'L LAW. 541, 542-43 (1984).

will be viewed as indicia of seriousness, which could lead them to *demonstrate* their objections to discovery through protests, blocking legislation and related measures.⁴⁸

Increasing Fairness to Litigants

Conceptual structure is also likely to correlate with fairness to litigants. Blocking legislation and related confrontational measures increase the costs and risks of litigation, reduce the predictability of outcomes and often place litigants in the position of having to choose between violating United States law and violating foreign law. Consequently, reducing incentives for foreign states to obstruct U.S. discovery tends to improve fairness to litigants.

Increased structure also tends to reduce both unintentional and intentional judicial bias. A judge acting without a structured analytical framework may be more responsive to the demands of domestic litigants and U.S. interests merely because he understands them better than he does foreign interests.⁴⁹ Conceptual structure counteracts this unintentional bias by identifying relevant issues and relating them to a coherent framework of analysis. A structured framework also tends to counteract pressure on the judge to protect domestic interests and litigants, because it provides authority to which the judge can refer in support of potentially unpopular decisions.

Furthermore, a structured framework of analysis increases the information available to litigants. Where litigants can reasonably predict judicial responses to discovery requests, they can make informed evaluations of whether to incur the costs and risks involved in the proceedings.

Increasing the Effectiveness of U.S. Litigation

Finally, a structured framework of analysis should improve the efficiency and effectiveness of U.S. litigation involving extraterritorial discovery. In an amorphous decision-making context, litigants on both sides have an incentive to make as many and as varied arguments as possible because they cannot predict what will influence the judge's decision.⁵⁰ The result is often inefficient litigation encumbered by marginally relevant arguments and burdened by attendant delays and elevated costs. The problem is particularly severe in the context of extraterritorial discovery, for there are few limits on the variety of arguments that might conceivably relate to the general goals of comity and fairness. Where guiding principles are well articulated, there is less incentive for overargument, and the delays and costs of litigation are correspondingly contained.

⁴⁸ See *infra* text accompanying notes 145-50.

⁴⁹ See *Aerospatiale*, 107 S.Ct. at 2560 (Blackmun, J., dissenting); Heck, *supra* note 47, at 279; H. STEINER & D. VAGTS, *supra* note 47, at 611; and Wilkey, *supra* note 47, at 542-44.

⁵⁰ See Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 830-32 (1985).

COMPREHENSIVENESS

To be effective, the analytical framework for evaluating extraterritorial discovery must also be comprehensive. Such discovery may involve many principles from international as well as from domestic law. Because of the many uncertainties in the law on this subject, the applicability of these principles is frequently unclear, and they often appear to conflict. Potentially applicable principles must therefore be identified and integrated into a framework that provides guidance in resolving these conflicts.

In *Aerospatiale* the Supreme Court failed to locate the principles it discussed in either a conceptual or a factual context.⁵¹ It did not make clear the relationship between the principles announced in the case and other potentially applicable legal principles. As a result, some may mistakenly assume that *Aerospatiale* is the sole source of authority on extraterritorial discovery and that factors not identified in the case are not relevant to the analysis. The opinion, however, refers only to some of the applicable legal principles.

The most egregious omission is the Court's failure to discuss the role of customary international law.⁵² Customary international law establishes the rights or entitlements of states, and thus it provides the necessary framework for evaluating the justifiable expectations of states about the conduct of other states.⁵³ Clearly, therefore, customary international law must play a central role in effectively analyzing issues regarding extraterritorial discovery. Moreover, customary international law is part of United States law;⁵⁴ consequently, U.S. courts are required to apply it, unless otherwise directed by Congress or, in some cases, the Executive.⁵⁵

The comity analysis required by *Aerospatiale* is implicitly based on concepts of customary international law, but the opinion fails to identify them as

⁵¹ Such a discussion was not necessary to resolve the case, and the Court therefore cannot be faulted for failing to include it. Considering the paucity of guidance concerning the principles of analysis to be used in such cases, however, one must regret the Court's failure to clarify the situation.

⁵² The Court also failed adequately to identify the relationship between the principles it was enunciating and existing case law. Although many of the issues in previous cases have either been resolved or rendered irrelevant by *Aerospatiale*, those cases remain an important source of guidance on, e.g., the application of international law to discovery and the evaluation of fairness in extraterritorial discovery. For a digest of such cases, see Note, *Hague Evidence Convention: A Practical Guide to the Convention, United States Case Law, Convention-Sponsored Review Commission (1978 & 1985), and Responses of Other Signatory Nations: With Digest of Cases and Bibliography*, 16 GA. J. INT'L & COMP. L. 73, 99, App. A (1986).

⁵³ For discussion of the entitlement concept, see D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1100, 1113 (1982).

⁵⁴ See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900); *The Over the Top*, 5 F.2d 838, 842 (D. Conn. 1925); and *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252-53 (1983). For discussion of the relations between national and international law, see, e.g., 2 E. NEREP, *EXTRATERRITORIAL CONTROL OF COMPETITION UNDER INTERNATIONAL LAW*, ch. VII (1983); and Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 792, pts. I & II (1952-53).

⁵⁵ See generally Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1567 (1984).

such. The central concept in the Court's comity analysis, for example, involves the "sovereign interests" of foreign states⁵⁶ and necessarily implies reference to the public international law concept of sovereignty to determine its content.⁵⁷ Similarly, according to *Aerospatiale*, U.S. courts must limit discovery that is unjustifiably "intrusive" on the interests of foreign states.⁵⁸ To assess whether particular action is intrusive, however, one must determine the sphere of protection to which the state is entitled, and this sphere of protection is established by international law.

III. TOWARD AN ANALYTICAL FRAMEWORK

Given the Supreme Court's failure to provide a structured and comprehensive framework for analyzing requests for extraterritorial discovery, this section attempts to do so through the use of elements provided by the *Aerospatiale* case, as well as other relevant principles of domestic and international law.

The basic framework can be stated succinctly. Where an order for extraterritorial discovery would violate either United States standards of procedural fairness or established norms of international law, it must be modified to avoid such violations. Where the United States Government reasonably requests that discovery be modified to avoid serious harm to U.S. foreign relations interests, the court must so limit discovery. In all other cases, the court must weigh the need for the requested information against the harm to the sovereign interests of foreign states that may result, and it must limit discovery to the extent necessary to avoid unjustified harm to those interests.

PRIVATE INTERESTS: FAIRNESS AND THE LITIGANT

The Separation of Public and Private Interests

Effective analysis of extraterritorial discovery requests requires that a fundamental distinction be made between private and public interests. The *Aerospatiale* decision considers both sets of interests,⁵⁹ but it fails to identify their distinct roles; as a result, some might mistakenly suppose that they can be mixed together in the decisional process.

The private interests of litigants in U.S. courts are protected by a standard of procedural fairness that is applicable to all discovery requests, regardless of where the information is located.⁶⁰ Application of this fairness stand-

⁵⁶ *Aerospatiale*, 107 S.Ct. at 2555-56.

⁵⁷ An argument that sovereign interests can be determined without reference to international law would be hard to sustain, because without reference to international law there would be no basis for ascribing content to the concept.

⁵⁸ *Aerospatiale*, 107 S.Ct. at 2556.

⁵⁹ *Id.* at 2542, 2555.

⁶⁰ This requirement of fairness derives from the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. See generally *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980);

ard is required by United States law, and a court has no authority to compromise it by reference to international or state interests.

Even if there were authority to "balance" private and state interests, there would be no principled basis on which to do so. Protection of a litigant's right to fair treatment is based on values that are not related to state and international interests, and therefore cannot be balanced against them. Moreover, any attempt to balance the fairness interests of a particular litigant against international and state interests on a general scale of "importance" not only would be unprincipled, but also would necessarily be biased in favor of state interests.⁶¹

Consequently, application of the fairness standard must be an independent element of the analysis, and a request for discovery abroad must be denied or modified where it would violate fairness standards under U.S. law.

Application of the Fairness Standard

Where information is located outside the United States, the fairness standard may require consideration of factors that generally would not be present in the domestic context.⁶² The most important such factor relates to the ability of a foreign state to control sources of information within its territory. For example, a U.S. court must decide whether it would be fair to penalize a litigant for failure to comply with a discovery order where, under the law of the foreign state, such compliance would lead to the imposition of sanctions.⁶³

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). See also Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 582 (1983); and Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643 (1985).

Fairness is also specifically called for in the discovery context in Fed. R. Civ. P. 26(c), which states, in relevant part, that a court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." See generally *Kerschbaumer v. Bell*, 112 F.R.D. 426, 427 (D.D.C. 1986).

⁶¹ A court applying an unstructured "balancing" analysis based on an undefined standard of "importance" to a conflict between the interests of a state and those of an individual would in most cases presumably find that the interests of the state were more "important," because a state's conduct typically has more numerous and significant effects on persons and institutions than an individual's.

⁶² See, e.g., Heck, *supra* note 47, at 252 ("U.S. law recognizes that discovery abroad is different from domestic proceedings and therefore may have to be exercised more restrictively"); Lowenfeld, *Sovereignty, Jurisdiction, and Reasonableness: A Reply to A. V. Lowe*, 75 AJIL 629, 634 (1981); and R. von Mehren, *Transnational Litigation in American Courts: An Overview of Problems and Issues*, 3 DICK. J. INT'L L. 43, 50 (1984).

⁶³ In some cases, the fairness doctrine may be applied after a discovery order has been entered. The Supreme Court indicated in *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), that this may be a more appropriate procedural context for evaluating certain issues.

Evaluation of fairness issues need not, however, be confined to this procedural context, and there may be significant waste and unfairness in doing so. Where a court reasonably believes, for example, that foreign blocking legislation would be applied to prevent compliance with its

In analyzing fairness, a court must consider the actual impact of the foreign blocking legislation on the particular litigant. Consequently, the court must consider factors such as whether the statute is regularly enforced⁶⁴ and, in some cases, whether the litigant has made a good faith effort to avoid the impact of the legislation.⁶⁵ It must also consider the penalties for violation of the legislation.⁶⁶ Where the foreign litigant cannot reasonably comply with an order of a U.S. court, it would generally be unfair to impose a penalty for noncompliance.⁶⁷

The fairness analysis must include, in addition, the increased costs, risks and compliance burdens that may result from the foreign location of persons or documents. For example, the costs and risks incurred by sending large numbers of documents all the way to the United States to be examined for long periods may substantially disadvantage a foreign litigant.⁶⁸ Moreover, the foreign location of persons or documents may expose the litigant to unfair manipulation by an opponent in the U.S. litigation; the Supreme Court, however, has specifically directed lower courts to protect litigants against such manipulation.⁶⁹

Fairness is necessarily a relational concept. It requires evaluation of the needs of those seeking extraterritorial discovery as well as of those resisting it. Where the fairness analysis involves burdens on the requested party rather than ability to comply, those burdens must be evaluated in light of the requesting party's need for the discovery. A demonstrated need for specific information justifies greater burdens on the requested party than the pursuit of unspecified information that might merely lead to usable evidence.⁷⁰

The relational aspect of the fairness test also requires consideration of the actions of the requesting party. For example, attempts by a litigant to use the foreign location of information to gain an advantage over an opponent should constitute a waiver of fairness protections. This aspect of the fairness test is likely to be particularly important in two contexts. Fairness protections should not be available to a litigant that has attempted to avoid obligations under U.S. law by intentionally placing documents in foreign terri-

order, requiring the litigant to attempt to evade its application is likely to be both wasteful and useless.

⁶⁴ See, e.g., *Garpeg, Ltd. v. United States*, 583 F.Supp. 789, 797 (S.D.N.Y. 1984); *Compagnie Francaise d'Assurance pour le Commerce Extérieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 30 (S.D.N.Y. 1984); and *Graco Inc. v. Kremlin, Inc. & SKM*, 101 F.R.D. 503, 514 (N.D. Ill. 1984).

⁶⁵ See, e.g., *United States v. Vetco, Inc.*, 644 F.2d 1324, 1332 (9th Cir. 1981), cert. denied, 454 U.S. 1098 (1981); and *United States v. First Nat'l City Bank*, 396 F.2d 897, 905 (1968).

⁶⁶ Where the penalty involves a fine, ability to pay may also be a factor. A \$5,000 fine, for example, may be a significant factor for a small firm but a bagatelle for a large firm.

⁶⁷ The foreign party presumably cannot comply where the situs state uses force to prevent compliance, as well as where the penalties for violating the statute would involve loss of personal freedom or significant financial burdens.

⁶⁸ *Aérospatiale*, 107 S.Ct. at 2567.

⁶⁹ *Id.*

⁷⁰ The degree of specificity in requesting information is critical. Requests for specific information—e.g., documents relating to a particular conversation—generally also entail fewer burdens on the requested party than broader discovery requests.

tory.⁷¹ Moreover, they should not be available to a party that utilizes U.S. discovery rules but resists their application to itself.⁷²

United States courts consistently have required that fairness considerations be part of the analysis of extraterritorial discovery.⁷³ They have held, for example, that the effect of foreign blocking legislation on a litigant's ability to comply with a discovery order must be considered in assessing the propriety of sanctions against that party for failure to comply.⁷⁴ Moreover, the foreign location of documents has led courts to order the use of alternative means of obtaining information where the burdens of complying with the discovery request were excessive.⁷⁵ Consequently, there is not only ample case law to support the consideration of such issues, but also guidance concerning the factors to be evaluated.

THE APPLICATION OF PUBLIC INTERNATIONAL LAW NORMS

A second component of the analysis asks whether the requested extraterritorial discovery would violate an established norm of public international law.⁷⁶

Claims that U.S. extraterritorial discovery violates customary international law are based on a fundamental postulate of international law, which provides that a state may not "interfere" with the "sovereignty" of another state—i.e., its control over conduct within its territory.⁷⁷ The principle of noninterference is thus central to the controversy over extraterritorial discovery.

At issue here is the extent to which specific applications of this principle have been established as norms of state conduct under international law. Several such norms are well established. For example, an agent of a state may not act on its behalf within foreign territory without the consent of the

⁷¹ See, e.g., *In re Anschuetz & Co.*, 754 F.2d 602, 607 (5th Cir. 1985), *remanded*, 55 U.S.L.W. 3852 (1987); and *Cooper Indus. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984). See generally Sadoff, *The Hague Evidence Convention: Problems at Home of Obtaining Foreign Evidence*, 20 INT'L LAW. 659, 664-65 (1986).

⁷² See, e.g., *International Soc'y for Krishna Consciousness v. Lee*, 105 F.R.D. 435, 446 (S.D.N.Y. 1984).

⁷³ See, e.g., *McLaughlin v. Fellows Gear Shaper Co.*, 102 F.R.D. 956 (E.D. Mo. 1984). See generally Rosdeitcher, *Foreign Blocking Statutes and U.S. Discovery: A Conflict of National Policies*, 16 N.Y.U. J. INT'L L. & POL. 1061 (1984).

⁷⁴ See, e.g., *Graco Inc. v. Kremlin, Inc. & SKM*, 101 F.R.D. 503, 513 (1984); and *In re Uranium Antitrust Litigation*, 480 F.Supp. 1138, 1147 (N.D. Ill. 1979).

⁷⁵ See, e.g., *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 61 (E.D. Pa. 1983); and *Laker Airways v. Pan American World Airways*, 105 F.R.D. 42 (D.D.C. 1984).

⁷⁶ The Court's failure to discuss this issue in *Aerospatiale* may have been based on the assumption that no such customary law norms were involved in the case, and therefore that there was no need to address the point.

⁷⁷ For discussion of the noninterference principle, see Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L. 185, 209-20 (1985). See generally I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 310 (3d ed. 1979); and T. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 120 (P. Winfield 7th rev. ed. 1923).

foreign sovereign.⁷⁸ Consequently, a U.S. court may not send police or military forces onto foreign territory to enforce a U.S. judgment.⁷⁹ Similarly, it is well established that a state may not send its agents onto foreign territory to seize documents for review,⁸⁰ nor may it order depositions within a foreign state.⁸¹

The current controversy relates primarily to whether existing norms of conduct prohibit U.S. courts from requiring (1) that documents located within a foreign state be made available for inspection within foreign territory (extraterritorial document inspection), and (2) that persons or materials located in foreign territory be made available for inspection in the United States (information removal). Many foreign governments consider that both actions violate international law.⁸² While United States courts have divided over the legality of extraterritorial document inspection orders,⁸³ they generally have not considered removal orders to be violations.⁸⁴

⁷⁸ See, e.g., I. BROWNLIE, *supra* note 77, at 306-07. According to Hans Kelsen:

That the territory enclosed by the boundaries of a state legally belongs to this state or—that it is usually characterized—that it is under the territorial supremacy or sovereignty of this state means that all individuals staying on this territory are, in principle, subjected to the legal power of that state and only of that state.

H. Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 317-18 (R. W. Tucker 2d rev. ed. 1966).

⁷⁹ See, e.g., 1 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 225 (1963); Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 127-58 (1964 I); and Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. MIAMI L. REV. 733, 751 (1983).

⁸⁰ See, e.g., 6 M. WHITEMAN, *supra* note 79, at 160-83 (1968); and *Ings v. Ferguson*, 282 F.2d 149, 151 (2d Cir. 1960).

⁸¹ See generally 1 B. RISTAU, *supra* note 9, at 90-93; Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924); Oxman, *supra* note 79, at 749-52; and Note, *Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law*, 63 COLUM. L. REV. 1441 (1963). See also, e.g., *Work v. Bier*, 106 F.R.D. 45, 48 (D.D.C. 1985); and *Graco Inc. v. Kremlin, Inc. & SKM*, 101 F.R.D. 503, 513 (N.D. Ill. 1984).

⁸² See, e.g., Brief for the Republic of France at 16, *Aerospatiale*, 107 S.Ct. 2542 (1987); Brief for the Federal Republic of Germany at 13, *id.*; and Brief for the Government of Switzerland at 8, *id.*

⁸³ For cases refusing orders for extraterritorial document inspection on sovereignty grounds, see, e.g., *Compagnie Francaise d'Assurance pour le Commerce Extérieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 35 (S.D.N.Y. 1984); *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 60 (E.D. Pa. 1983); *TH. Goldschmidt A.G. v. Smith*, 676 S.W. 2d 443, 445 (Tex. App. 1984) ("[discovery orders] that conflict with West German reservations under the Convention . . . impinge upon the sovereignty of the Federal Republic of Germany and should not be issued in ordinary circumstances"); and *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App. 3d 840, 850, 176 Cal. Rptr. 874, 883 (Ct. App. 1981) (discovery orders executed in West Germany "would violate West German judicial sovereignty").

For cases holding that such orders would not violate foreign sovereignty, see, e.g., *International Soc'y for Krishna Consciousness v. Lee*, 105 F.R.D. 435, 449 (S.D.N.Y. 1984); and *Graco Inc. v. Kremlin, Inc. & SKM*, 101 F.R.D. 503, 520 (N.D. Ill. 1984).

⁸⁴ See, e.g., *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729 (5th Cir. 1985), *remanded*, 107 S.Ct. 3223 (1987); *In re Anschuetz & Co.*, 754 F.2d 602, 615 (5th Cir. 1985), *remanded*, 107 S.Ct. 3223 (1987) ("If Anschuetz is not voluntarily forthcoming in Germany, the court can order documents and the examination of witnesses to occur in the United States to avoid any infringement upon German sovereignty"); and *International Soc'y for Krishna Consciousness v. Lee*, 105 F.R.D. 435, 449 (S.D.N.Y. 1984).

Not unexpectedly, these differences in result depend on the analysis applied. Three basic theories have been used to determine whether extraterritorial discovery orders violate international law.

The Concept of Judicial Sovereignty

United States courts generally have analyzed the role of international law by reference to the concept of judicial sovereignty.⁸⁵ According to this view, an order by a U.S. court relating to information within a foreign state interferes with the rights of that state by usurping a governmental function that is there reserved to the judiciary.⁸⁶

The notion of judicial sovereignty was developed to conceptualize foreign opposition to U.S. extraterritorial discovery practices.⁸⁷ It is an aspect of the general concept of sovereignty, and thus quintessentially part of international law. However, because courts and commentators often have failed explicitly to recognize this fact, the concept is often used with little or no international law analysis to support its application.⁸⁸

The concept consistently has been held to prohibit the ordering of depositions on foreign soil.⁸⁹ Cases on extraterritorial document inspection, however, are less clear. Some courts have held that orders for such inspection violate foreign judicial sovereignty,⁹⁰ while others have distinguished depositions from document inspection on the ground that the latter is only

⁸⁵ See, e.g., *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120, 123-24 (8th Cir. 1986); *Borero v. Fiat S.p.A.*, 763 F.2d 17, 19 (1st Cir. 1985); *Compagnie Francaise d'Assurance pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 26 (S.D.N.Y. 1984); and *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App. 3d 840, 852, 176 Cal. Rptr. 874, 881 (1981).

⁸⁶ See, e.g., *Report of United States Delegation to Eleventh Session of Hague Convention on Private International Law*, 8 ILM 785, 806 (1969) [hereinafter *1969 Delegation Report*].

⁸⁷ For description of the development of this concept, see Gerber, *supra* note 3, at 775-79. See also Oxman, *supra* note 79, at 761-65; and *Report of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (July 1985)*, 24 ILM 1668, 1678 (1985) [hereinafter *1985 Special Commission Report*]. In drafting the Convention, this concept of judicial sovereignty was "constantly borne in mind." *1969 Delegation Report*, *supra* note 86, at 806.

⁸⁸ See, e.g., *Lowrance v. Michael Weining, GmbH*, 107 F.R.D. 386, 388-89 (W.D. Tenn. 1985); and *Cooper Indus. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984).

⁸⁹ See, e.g., *Work v. Bier*, 106 F.R.D. 45, 56-57 (D.D.C. 1985); *International Soc'y for Krishna Consciousness v. Lee*, 105 F.R.D. 503, 520 (N.D. Ill. 1984); *Cooper Indus. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984); and *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 33 Cal. App. 3d 508, 509, 109 Cal. Rptr. 219, 220 (1973). For discussion of the difficulties of taking depositions in a foreign state, see Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1053-59 (1961); and Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 522-34 (1953).

⁹⁰ See, e.g., *McLaughlin v. Fellows Gear Shaper Co.*, 102 F.R.D. 956, 959 (E.D. Pa. 1984) (court declined to order compliance because "some of the requests for production of documents, because of their sweeping character, may very well require of persons located in West Germany, efforts which would be substantially equivalent to producing evidence in that country"); and *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 60 (E.D. Pa. 1983).

ancillary to the judicial process.⁹¹ Nevertheless, this distinction is difficult to maintain, and U.S. courts recently have tended to avoid ordering document inspection and to order instead that documents be produced in the United States.

The reason is that the concept of judicial sovereignty does not prohibit removal orders. Orders requiring that persons be deposed or documents produced in the United States consistently have been held not to represent the exercise of judicial functions on foreign territory.⁹² As a result, reliance on the concept of judicial sovereignty has led U.S. courts to assume that objections to discovery under international law can be avoided by ordering that discovery take place in the United States.⁹³ The question remains whether this concept of usurpation properly defines the scope of the principle of noninterference.

The Locus of State Conduct

Judicial sovereignty may also be viewed as merely one application of the broader principle of international law that proscribes conduct by one state within the territory of another without the latter's consent.⁹⁴ This principle is a fundamental postulate of international law,⁹⁵ and it is based directly on state practice.

If this broader standard is applied to extraterritorial discovery, the issue is whether a U.S. attorney acting under authority of a U.S. court order is acting as an agent of the United States, and there can be little doubt that he is. Consequently, under this analysis, orders for extraterritorial document inspection are prohibited. Removal orders are permitted, however, because they do not involve conduct by agents of the United States on foreign territory.

⁹¹ See, e.g., *In re Anschuetz & Co.*, 754 F.2d 602, 611 (5th Cir. 1985), *remanded*, 107 S.Ct. 3223 (1987); and *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120, 124-25 (8th Cir. 1986).

⁹² See, e.g., *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729, 732 (5th Cir. 1985), *remanded*, 107 S.Ct. 3223 (1987); *In re Anschuetz & Co.*, 754 F.2d 602, 615 (5th Cir. 1985), *remanded*, 107 S.Ct. 3223 (1987); *International Soc'y for Krishna Consciousness v. Lee*, 105 F.R.D. 503, 521 (N.D. Ill. 1984); *Lowrance v. Michael Weining, GmbH*, 107 F.R.D. 386, 388 (W.D. Tenn. 1985); and *Cooper Indus. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984).

⁹³ See, e.g., *In re Anschuetz & Co.*, 754 F.2d 602, 615 (5th Cir. 1985), *remanded*, 107 S.Ct. 3223 (1987); *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729, 732 (5th Cir. 1985), *remanded*, 107 S.Ct. 3223 (1987); and *Graco Inc. v. Kremlin, Inc. & SKM*, 101 F.R.D. 503, 521 (N.D. Ill. 1984) ("Nor does the court agree that the Convention requires deference to a country's judicial sovereignty over documents, people, and information—if this really is how judicial sovereignty is to be understood—when they are to be produced in this country").

⁹⁴ For discussion of this principle, see G. VON GLAHN, *LAW AMONG NATIONS* 119-21 (5th ed. 1986); 1 L. OPPENHEIM, *INTERNATIONAL LAW* 265-70 (Lauterpacht 5th ed. 1937); H. KELSEN, *supra* note 78, at 357; E. DE VATTEL, *LE DROIT DES GENS* 138-43 (1758) (G. Gregory trans. 1964); and Maier, *supra* note 60, at 582-86.

⁹⁵ See, e.g., S.S. "Lotus" (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10 (Judgment of Sept. 7), 2 M. O. HUDSON, *WORLD CT. REP.* 20, 35 (1935).

Coercing Foreign Conduct: The Extension of State Power

A third theory used to ascribe content to the principle of noninterference asserts that a state may not coerce conduct within another state without the latter's consent,⁹⁶ at least where such conduct violates basic principles of the latter state's legal system. Here the concern is not with the locus of the state's conduct, but with the extension of its power to cover private conduct occurring in foreign territory.

The broadest extension of this analysis would find a violation of the principle of noninterference wherever a state attaches significant sanctions to conduct on foreign territory.⁹⁷ This argument is undermined, however, by the fact that some foreign states also attach legal consequences to the failure of a party to produce information located abroad, and such practices generally have not been considered to violate the noninterference principle.⁹⁸

According to a narrower version of this analysis, a violation occurs only where the required conduct violates fundamental principles of the foreign legal system.⁹⁹ The rationale is that where a state requires conduct on foreign territory that is substantially consistent with fundamental principles and procedures of the situs state, there can be no interference with that state's legal order because the protections established by that state continue to be applied. Interference occurs only where those protections are denied.

In the context of discovery, the argument has been advanced that U.S. procedures violate international law because they deny fundamental protections to which persons are entitled under the laws of the situs state.¹⁰⁰ In particular, it has been argued that a violation may occur where U.S. procedures coerce the production of information without a prior determination by a judge that the information is directly relevant to the litigation.¹⁰¹

⁹⁶ According to Kelsen:

That the legal power of the state is limited to its own territory does not mean that no act of the state may legally be carried out outside this state's territory. The limitation refers in principle to coercive acts in the wider sense of the term, including also the preparation of coercive acts. These acts must not be executed on the territory of another state without the latter's consent. Without such consent they constitute a violation of international law.

H. Kelsen, *supra* note 78, at 310-11.

⁹⁷ See, e.g., Brief for the Government of Switzerland at 3, *Aerospatiale*, 107 S.Ct. 2542 (1987); and Brief for the Government of the United Kingdom of Great Britain and Northern Ireland at 17, *id.*

⁹⁸ See, e.g., P. SCHLOSSER, *DER JUSTIZKONFLIKT MIT DEN VEREINIGTEN STAATEN* 17-22 (1985).

⁹⁹ See, e.g., Stiefel, "Discovery"-Probleme und Erfahrungen im Deutsch-Amerikanischen Rechtshilfeverkehr, 25 *RECHT DER INTERNATIONALEN WIRTSCHAFT* 509, 514-20 (1979); and *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] 1 All E.R. 434, 448, [1978] 2 W.L.R. 81, reprinted in 17 *ILM* 38, 43 (1978).

¹⁰⁰ This argument is sometimes based on the private international law concept of *ordre public*. For discussion of *ordre public*, see, e.g., O. KAHN-FREUND, *GENERAL PROBLEMS OF PRIVATE INTERNATIONAL LAW* 282-85 (1980); Forde, *Ordre Public*, 23 *INT'L & COMP. L.Q.* 259 (1980); and Paulsen & Sovorn, *Public Policy and the Conflict of Laws*, 56 *COLUM. L. REV.* 969 (1956).

¹⁰¹ See, e.g., *Corning Glass Works v. ITT*, 20 *ILM* 1025, 1029 (1981) (Munich Ct. App. 1980).

The primary significance of applying the coercion analysis is that under that analysis removal orders may violate the principle of noninterference, whereas removal orders do not violate international law under the other theories. It is generally agreed that under international law there are limits on the extent to which a state may coerce conduct within the territory of a foreign state.¹⁰² The content of these limits has not been defined, however, and their application to extraterritorial discovery remains unclear.

Analysis of extraterritorial discovery orders under international law thus yields the following conclusions: a U.S. court would violate a norm of customary international law by ordering depositions on foreign territory and probably by ordering extraterritorial document inspection, but there are no established norms that specifically prohibit removal orders. Substantial uncertainty remains, however, over the application of the principle of noninterference to extraterritorial discovery, largely because recent changes in U.S. discovery procedures and the expanded application of those procedures to foreign information have created a new factual situation,¹⁰³ and settled principles of law have not yet developed in response to that situation.

COMITY AND BALANCING

United States courts have long recognized that the exercise of U.S. jurisdiction may infringe on legally protected interests of foreign states, and they have employed the concept of comity as a mechanism for minimizing such conflicts.¹⁰⁴ The function of this third element of the analytical framework is thus to provide a means of regulating conflicts between states over extraterritorial discovery.¹⁰⁵ Comity balancing is often viewed as an essentially unstructured, hence discretionary, process,¹⁰⁶ but a decision-making process of this type is not appropriate for accommodating state interests.¹⁰⁷ Consequently, comity is used here as an analytical tool for resolving conflicts in the international legal system.

The Objectives of Comity Balancing

To develop analytical content in a balancing framework, the objectives must be clearly identified, because they provide the basis for evaluating

¹⁰² See, e.g., Mann, *supra* note 79, at 137.

¹⁰³ For discussion of this development, see Gerber, *supra* note 3, at 746-47.

¹⁰⁴ See generally Yntema, *supra* note 32; and Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AJIL 280 (1982). For judicial treatment of the concept, see, e.g., *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972); *Laker Airways v. Sabena, Belgium World Airways*, 731 F.2d 909, 937 (D.C. Cir. 1984); *United States v. First Nat'l City Bank*, 396 F.2d 897, 902 (2d Cir. 1968); and *Ings v. Ferguson*, 282 F.2d 149, 151-52 (2d Cir. 1960).

¹⁰⁵ According to one commentator: "The weighing of state interests, including the interests of the individual, is thus a process compelled by international customary law. Whether the weighing of state interests standard in and of itself is a rule of international law, is immaterial." 2 E. NEREP, *supra* note 54, at 558.

¹⁰⁶ For discussion, see Gerber, *supra* note 77, at 204-06.

¹⁰⁷ See *supra* text accompanying notes 47-48.

competing interests and the mechanism for comparing those evaluations. With respect to extraterritorial discovery, the objective of comity balancing should be to accommodate the legally protected interests of the United States, on the one hand, and of foreign states affected by the discovery, on the other. Extraterritorial discovery creates conflicts between these two sets of interests, and comity thus requires that each state accept limits on its own entitlements so as not unnecessarily or unreasonably to harm the entitlements of the other.¹⁰⁸

The comity analysis should aim to achieve compromises among conflicting interests. In an individual case, the standard should be whether the harm caused to the legal interests of a foreign state by a particular discovery order is justified by the need to protect an equal or greater U.S. interest that cannot be protected with reasonable cost by less harmful means.

The frame of reference for the comity analysis is systemic.¹⁰⁹ No state can secure evidence abroad without at least the tacit cooperation of the situs state. States are therefore dependent on each other to accomplish the purely domestic function of providing a fair and reasonable procedure for resolving civil disputes. Where the legal principles governing extraterritorial discovery reflect a reasonable accommodation of the legal interests of all states involved, cooperative state relationships will continue effectively to furnish access to information abroad. Where there is no such accommodation, the necessary cooperation between states will be impaired, and litigation involving evidence abroad will be rendered either unjust or ineffective or both.¹¹⁰ The system of state relationships performs a function that no state could achieve by itself, and this function justifies limitations on the policies of individual states.

The Interests to Be Balanced

Effective balancing also requires standards for determining which interests are to be balanced. The starting point for analyzing this issue must be the recognition that the "interests" in question cannot refer to the subjective interests of states—i.e., states cannot have whatever protections they

¹⁰⁸ See generally Maier, *supra* note 104, at 303–20; and Meessen, *The International Law on Taking Evidence from, Not in, a Foreign State: The Anschuetz and Messerschmidt Opinions of the United States Court of Appeals for the Fifth Circuit, Petitioners' Brief in Response to the Solicitor General's Brief for the United States, Anschuetz & Co. v. Mississippi River Bridge Auth.*, 107 S.Ct. 3223, App. 4 (1987) (cert. granted and case remanded in light of *Aerospatiale*).

¹⁰⁹ In recent years, the systemic aspects of the comity doctrine have been developed primarily by Professor Harold Maier. See, e.g., Maier, *supra* note 104, at 281–85. See also Maier, *Extraterritorial Discovery: Cooperation, Coercion and the Hague Convention*, 19 VAND. J. TRANS-NAT'L L. 239, 252–55 (1986).

¹¹⁰ Where a foreign state prohibits compliance with U.S. procedures, it may render those proceedings unfair by making it unreasonable to expect litigants to comply with the court's order. A foreign state may also physically prevent information—e.g., documents—from leaving its territory and thus render ineffective the procedures of the requesting state. In both cases the actions of the situs state prevent the requesting state from achieving the objective of providing fair and effective procedures.

choose. A state may have a wide range of general "interests" in the outcome of any litigation. For example, it may wish to protect persons or enterprises from costs, inconvenience or the necessity of disclosing valuable information,¹¹¹ but legal analysis is possible only where there is a standard for evaluating these interests.

Lack of analysis of this issue has allowed room for the assumption that the interests to be balanced are somehow determined or at least influenced by the desires of the states themselves, but the fallacy of this reasoning is obvious. There is no objective means of measuring the subjective interests of states; consequently, a balancing test that attempted to measure them would have no content and would necessarily be discretionary.¹¹²

The standards for determining which interests are relevant to the comity analysis must therefore be objective; that is, the determination of whether an interest is to be included must be based on objectively ascertainable criteria. This means, first, that the only interests that should be relevant to the comity analysis are the legal interests of the states involved, because only legal interests are objectively ascertainable. Second, only public international law provides a reference framework for applying the comity test, because it alone defines the legal interests of states vis-à-vis each other.¹¹³

International law is not only the sole means of achieving objectivity in the comity analysis, but also the sole source of generally accepted principles defining the rights, obligations and legitimate expectations of states. If the objective of comity balancing is to accommodate the legitimate interests and expectations of states, it must be guided by international law principles. The issue here is not whether existing norms of conduct under international law have been violated.¹¹⁴ Rather, a court is asked to look to the principles and processes of international law to determine which interests of states are legally protected. International law is thus used to render guidance in achieving domestic legal objectives.¹¹⁵

¹¹¹ See, e.g., Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 AJIL 756, 776-79 (1983).

¹¹² Foreign subjective interests may be relevant to the analysis of extraterritorial discovery, but only in a separate context. See *infra* text accompanying notes 151-53. On the problems of trying to combine objective and subjective elements in the same analysis, see Maier, *supra* note 60, at 582-88.

¹¹³ National legal systems cannot provide objectivity in the international context, because they do not regulate the relationships among states and because each is subject to alteration by the state in which it operates.

¹¹⁴ For discussion of that issue, see text at notes 76-103 *supra*.

¹¹⁵ Such uses of international law have long been neglected, perhaps as a result of the positivist focus on the existence or nonexistence of specific norms, as well as on the separation of international law analysis from domestic legal analysis. Recently, attention has begun to be paid to the related issue of the role of "international soft law"—i.e., international principles that do not have the force of norms. See, e.g., Baxter, *International Law in "Her Infinite Variety,"* 29 INT'L & COMP. L.Q. 549 (1980); and G. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 179-91 (1983). See also Weil, *Vers une normativité relative en droit international?*, 86 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5 (1982), modified, expanded and translated in 73 AJIL 413 (1983).

United States regulatory interests. A state is entitled under international law to regulate its system of civil procedure as it wishes, provided that in so doing it does not unjustifiably harm the protected interests of foreign states.¹¹⁶ The interests protected are what may be called "regulatory interests"—the right of a state to control its own domestic policies. For purposes of the comity analysis, therefore, the United States has a legally protected interest in applying its own discovery rules, and it is this interest that is to be balanced against any protected interests of other states.

The U.S. regulatory interest in applying discovery procedures extraterritorially derives from the role of discovery in the U.S. procedural system, which is to secure information for civil litigation.¹¹⁷ Consequently, the U.S. regulatory interest in any requested discovery is a function of the importance of that information to the litigation; the more important the information is in a given case, the greater the interest of the United States in acquiring it.

Further analysis reveals that discovery actually performs two distinct functions in the U.S. system. One is to obtain reasonably identified evidence for use in proving contested facts (evidence gathering); the other is to *search* for information that may be used to identify such evidence (evidence seeking).¹¹⁸ These functions represent different degrees of regulatory interest. Where information has been reasonably identified as directly relevant to the outcome of the litigation—i.e., where the source of the information (witness or document) is needed as evidence¹¹⁹—the U.S. interest is higher than where it is sought merely to determine whether it might eventually yield admissible evidence.¹²⁰

The distinction between these two functions is important, because one is in accord with the practice of other states, while the other is not. Most states use state power to coerce persons subject to their jurisdiction into producing reasonably identified evidence.¹²¹ Foreign states generally do not, however, allow state power to be used to search for evidence, at least not to the extent that this is done in the United States.¹²²

¹¹⁶ See, e.g., I. BROWNLIE, *supra* note 77, at 298–99.

¹¹⁷ See generally Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1298–1303 (1978).

¹¹⁸ See generally *Hickman v. Taylor*, 329 U.S. 495, 507 (1947); *Lyell Theatre Corp. v. Loews Corp.*, 91 F.R.D. 97, 99 (W.D.N.Y. 1981) ("The purpose of discovery has been succinctly stated as 1) to narrow the issues; 2) to obtain evidence for use at trial; and 3) to secure information about the existence of evidence"); and *Nutt v. Black Hills Stage Lines, Inc.*, 452 F.2d 480 (8th Cir. 1971). See also 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §2001 (1970).

¹¹⁹ The concept of relevance used in the United States often differs dramatically from similar concepts employed in other legal systems. For discussion, see, e.g., Gerber, *supra* note 3, at 761–63.

¹²⁰ This is also the position of the new *Restatement*. See *RESTATEMENT (THIRD)*, *supra* note 5, §442 comment a.

¹²¹ See, e.g., R. SCHLESINGER, H. BAADE, M. DAMASKA & P. HERZOG, *COMPARATIVE LAW* 425–33 (5th ed. 1987).

¹²² For extensive discussion of the differences between the permissible scope of U.S. discovery and acceptable use of coercive power in the United Kingdom, see, e.g., Rio Tinto Zinc

The interests of foreign states. The interests of foreign states that are to be included in the comity analysis are identified in the *Aerospatiale* decision as "sovereign interests."¹²³ The language specifies that not all interests of a foreign state are to be considered in the analysis, but only those that relate to its sovereignty—i.e., those as to which it is entitled to protection under international law. The opinion thus implicitly requires the use of international law to determine whether interests are sovereign for purposes of the comity analysis.

Claims that U.S. extraterritorial discovery practices impinge on the sovereign interests of foreign states are based on the principle of noninterference.¹²⁴ In this context, however, that principle is not used as a source of accepted norms that prohibit defined conduct. Instead, it identifies state interests that may be harmed by particular conduct, thus requiring a balancing of those interests against the interests of the state causing the interference.

Consequently, the principle of noninterference performs two separate, but related, functions in analyzing extraterritorial discovery. It identifies certain state conduct as interference with the rights of a foreign state. In some cases, norms of customary international law have developed that prohibit such conduct, regardless of the interests of the regulating state. With regard to other types of conduct, no such norms have emerged, and a balancing analysis is necessary to determine whether the interference is justified.¹²⁵

Where a U.S. court orders conduct within foreign territory, such an order necessarily interferes with that state's control over its own territory. Where the interference does not violate an existing norm of customary law, the issue is the *degree* of "interference" or "intrusion" that results. This point was made by the Supreme Court in *Aerospatiale* when it said that some orders are "more intrusive" than others.¹²⁶ The more the conduct interferes with the situs state's right to control information and persons within its territory, the more serious is the resulting harm for purposes of the comity analysis.

Examples drawn from the opinion illustrate the point.¹²⁷ Where the requested discovery merely consists of requests for admissions or interroga-

Corp. v. Westinghouse Elec. Corp., [1978] 1 All E.R. 434, [1978] 2 W.L.R. 81, *reprinted in* 17 ILM 38 (1978). For further discussion, see Gerber, *supra* note 3, at 757-69.

¹²³ See, e.g., *Aerospatiale*, 107 S.Ct. at 2556 (emphasis added).

¹²⁴ See text at notes 77-103 *supra*.

¹²⁵ Although the use of international law that I here advocate—namely, as the central informing principle for domestic comity analysis—is in many ways new, it is clearly supported by modern trends in international law scholarship, particularly by the writings of Professors Myres McDougal, Michael Reisman and other associated scholars of the "Yale school of international law." McDougal and his colleagues have focused attention on the breadth of the international law process and on the interrelatedness of legal and other social processes, and the analysis I am here proposing draws on those insights. See, e.g., McDougal & Reisman, *The Prescribing Function: How International Law Is Made*, 6 YALE STUD. WORLD PUB. ORD. 249 (1980).

¹²⁶ *Aerospatiale*, 107 S.Ct. at 2556.

¹²⁷ *Id.* at 2555-56.

tories, there would typically be minimal harm to the protected interests of the foreign state.¹²⁸ An order to respond in writing to questions generally has little, if any, impact on a state's territorial prerogatives, and therefore such requests typically will encounter little difficulty in a comity analysis.¹²⁹

In contrast, where private documents are required to be made available for inspection within the state or to be removed from the state, there may be considerable interference with the control that the foreign state is entitled to exercise over its territory, depending on the nature of the documents, the number of documents sought and the degree of specificity with which they are identified. As indicated by the Supreme Court,¹³⁰ such extensive interference may not be justified by the importance of the documents to the litigation. In each case, therefore, the degree of harm to the legally protected interests of a foreign state must be weighed against the importance of the requested information to the litigation.

Alternative Means of Discovery: The Hague Evidence Convention

The comity analysis also requires consideration of alternative means of obtaining information. Where information can be obtained with reasonable cost and convenience by means that would entail significantly less harm to foreign sovereign interests than discovery procedures, the objective of minimizing harm to protected state interests requires that the former means be used instead of or prior to the latter.

The only significant potential alternative to discovery is the Hague Evidence Convention.¹³¹ Because the United States is a party to the Convention, the procedures it prescribes must be evaluated in the comity analysis if the situs state is also a party. As the Supreme Court held in *Aerospatiale*, a court may require those procedures to be used before resort is had to U.S. discovery rules where the Convention provides a reasonably efficient and convenient means of acquiring the information sought.¹³²

Use of the Convention entails no harm to protected interests of a state party because, by definition, that state has agreed to it.¹³³ Consequently, where these procedures can reasonably be expected to perform the functions otherwise performed by discovery procedures without undue inconvenience to the requesting party, the harm to foreign interests that would result from using discovery procedures cannot be justified. In each case, two issues require analysis: (1) how effective and convenient the procedures of

¹²⁸ The degree of harm will depend primarily on the scope of the interrogatories and the type of information requested. The broader the range of the interrogatories and the more politically or economically sensitive the information, the greater the degree of interference.

¹²⁹ Interrogatories may, of course, also raise issues of fairness to the litigant that must be analyzed separately. See text at notes 62-75 *supra*.

¹³⁰ *Aerospatiale*, 107 S.Ct. at 2557.

¹³¹ Information may be obtained from foreign territory through use of letters rogatory, but they do not oblige the situs state to provide the requested information and therefore cannot be viewed as a reasonable alternative to U.S. discovery procedures.

¹³² *Aerospatiale*, 107 S.Ct. at 2555.

¹³³ *Id.* at 2563 (Blackmun, J., dissenting).

the Convention would be in providing the requested information, and (2) how important the requested information is to the litigation.

For many purposes, the Convention clearly does offer a convenient and effective alternative to United States discovery.¹³⁴ Where a U.S. court properly requests information, the foreign court generally is required to supply it. In most cases, therefore, the litigant can reasonably rely on production. Moreover, the procedures, for the most part, are easily understood and their effectiveness in a particular case can reasonably be predicted. Finally, the costs of using them are minimal,¹³⁵ and compliance burdens are generally limited.¹³⁶

Nevertheless, two potentially significant limitations detract from the utility of the Convention as an alternative to U.S. discovery procedures. First, under the Convention, parties may not search for information to the extent possible under the U.S. rules. Most states take the position that its procedures may only be used to acquire information that a judge has determined to be directly related to issues involved in the litigation.¹³⁷

While this requirement may limit the scope of investigation in some cases, this reduction in scope may be offset by an increase in the ability of the foreign judge to acquire relevant information.¹³⁸ Moreover, such limitations in scope are often more apparent than real, because they merely require the United States attorney to specify and identify the requested information more clearly than would be necessary under U.S. rules.¹³⁹

The second limitation concerns the examination of documents under the Convention. Although by its terms the Convention applies to the examination of documents, most states have filed reservations under Article 23 declaring that they "will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common

¹³⁴ For general discussions of the practical advantages of using the Convention, see, e.g., Augustine, *Obtaining International Judicial Assistance under the Federal Rules and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters: An Exposition of the Procedures and a Practical Example: In re Westinghouse Uranium Contract Litigation*, 10 GA. J. INT'L & COMP. L. 101 (1980); Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States—A Practical Guide*, 16 INT'L LAW. 575 (1982); and 1969 *Delegation Report*, *supra* note 86, at 806–07. For discussions of the practical aspects of using the Convention to obtain information in particular states, see Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 INT'L LAW. 37 (1979); Collins, *Opportunities for and Obstacles to Obtaining Evidence in England for Use in Litigation in the United States*, *id.* at 27; and Shemanski, *Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation*, 17 *id.* at 465 (1983).

¹³⁵ See 1 B. RISTAU, *supra* note 9, at 225–28. See also Note, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters—A Comparison with Federal Rules Procedures*, 7 BROOKLYN J. INT'L L. 365, 396–97 (1981).

¹³⁶ Technical problems, e.g., translation, associated with gathering information from foreign sources may arise in using the Convention, but such problems are not necessarily greater or lesser than they would be if discovery procedures were used.

¹³⁷ See, e.g., 1 B. RISTAU, *supra* note 9, at 229–35.

¹³⁸ For discussion of the advantages of having a civil law judge do the questioning, see Langbein, *supra* note 50, at 826–30.

¹³⁹ See, e.g., Heck, *supra* note 47, at 234–35; and Shemanski, *supra* note 134, at 470.

Law countries," at least under certain circumstances.¹⁴⁰ This restricts the utility of the Convention, but only to a limited extent. First, not all parties have filed such reservations.¹⁴¹ Second, many of the reservations are limited in scope, often allowing documents to be acquired where they can be shown to be directly relevant to issues in the litigation.¹⁴² Finally, information about the contents of documents generally can be acquired through oral examination.¹⁴³ This oral information can often serve to establish the relevance—hence the accessibility—of the documents themselves.

The comity analysis requires that use of the Convention as an alternative to U.S. discovery procedures be assessed in the context of specific informational needs. Consequently, where particular information is not likely to be obtainable with reasonable convenience through the procedures of the Convention, an additional level of analysis is required.¹⁴⁴ Here the test would be whether the need for the requested information outweighs any harm to the sovereign interests of the situs state that would result from the use of U.S. discovery procedures.

The Expression of Sovereign Interests and the Subjectivism Fallacy

The majority opinion in *Aerospatiale* refers on two occasions to "sovereign interests expressed by foreign states."¹⁴⁵ These references implicate an ele-

¹⁴⁰ Art. 23, Hague Evidence Convention, *supra* note 9. See generally Note, *supra* note 52, at 73, 84–87.

¹⁴¹ States that have made reservations include Denmark, Finland, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden and the United Kingdom. 8 MARTINDALE-HUBBELL LAW DIRECTORY 15–21 (1987).

¹⁴² According to the reservation of the United Kingdom, for example:

In accordance with Article 23 Her Majesty's Government declare that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. Her Majesty's Government further declare that Her Majesty's Government understand "Letter of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:

- a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody, or power; or
- b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the request court to be, or to be likely to be, in his possession, custody or powers.

Declarations and Reservations of the United Kingdom, *id.* at 19.

For other reservations with similar provisions, see those of France, Luxembourg, the Netherlands, Norway, Portugal, Singapore and Sweden. *Id.* at 15–21.

¹⁴³ There are typically few limits on the right to question witnesses about the contents of documents. In Germany, for example, a witness is required to refresh his recollection about the content of documents, if necessary to have them with him, and to answer fully about their contents. See generally Martens, *German Civil Procedure and the Implementation of the Hague Evidence Convention*, 1 INT'L LITIGATION Q. 115, 120 (1985). For discussion of similar procedures in the United Kingdom, see J. LEVINE, *DISCOVERY: A COMPARISON BETWEEN ENGLISH AND AMERICAN CIVIL DISCOVERY LAW WITH REFORM PROPOSALS* 51–67 (1982).

¹⁴⁴ For information that is not reasonably and conveniently available under the Convention, the analysis is essentially the same as in cases where the situs state is not a party to the Convention.

¹⁴⁵ *Aerospatiale*, 107 S.Ct. at 2555, 2557 (emphasis added).

ment of subjectivism in the analysis that is not only misplaced and misleading, but also inconsistent with an effective analytical framework. As discussed above,¹⁴⁶ a comity analysis can only be effective where it is based on the objective evaluation of legally protected interests; the manner in which they are expressed should not be relevant.

Although "expression" is not explained by the Court, there are two ways that it can come into play. A state may "express" its interests by enacting blocking legislation and by attempting to influence U.S. litigation, whether through appeals to the Department of State¹⁴⁷ or through appearance as *amicus curiae*.¹⁴⁸ Since an unstructured analysis does not differentiate between objective and subjective issues, one might argue that such actions indicate the intensity of the state's concern and should be accorded weight in the balancing process.

The Supreme Court appears to have envisioned that the expression of interests could be used as a convenient and easily applicable filter to reduce the number of situations in which foreign interests must be considered, which, in turn, would reduce both burdens on the courts and the number of cases in which foreign sovereign interests could "block" the application of U.S. discovery rules. A court can readily determine whether a foreign state has "expressed" its interests and thus can easily filter out many cases.

A structured analytical framework, however, obviates the need for this type of artificial and easily avoidable conceptual filter.¹⁴⁹ In particular, an objective comity analysis gives weight to foreign interests according to readily ascertainable standards and only in a balancing context. The inclusion of subjective elements in the comity analysis would destroy its integrity by requiring courts to attempt to evaluate subjective interests and relate them to objective interests. Moreover, there is no basis for judicial evaluation of such subjective factors, and there is no basis for comparing them or relating them to objective factors.¹⁵⁰

In addition to rendering judicial decision making discretionary, the inclusion of subjective factors in the analysis of discovery requests would create incentives for foreign states to "express" their interests through blocking legislation and attempts to influence U.S. litigation. Any such response would further impede U.S. policy and interfere with the effectiveness of U.S. litigation.

¹⁴⁶ See text at notes 111-15 *supra*.

¹⁴⁷ For discussion, see Oxman, *supra* note 79, at 148 n.39; and Contemporary Practice of the United States, 73 AJIL 669, 678 (1979).

¹⁴⁸ On the use of statements by foreign governments, see Comment, *The Sovereign Compulsion Defense in Antitrust Actions and the Role of Statements by Foreign Governments*, 62 WASH. L. REV. 129, 146-49 (1987).

¹⁴⁹ These references appear to be part of the Court's response to the previous practice of utilizing the foreign sovereign compulsion defense to analyze blocking legislation. For discussion, see text at notes 156-172 *infra*.

¹⁵⁰ A state's position may, of course, be relevant to the analysis of state practice under customary international law, because customary international law develops through the responses of states to the actions of other states. A state's actions, however, are only relevant under certain circumstances and only when related to the actions of other states. For a leading discussion of the formation of customary international law, see, e.g., A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971).

FOREIGN RELATIONS INTERESTS OF THE UNITED STATES

While the degree of importance attached by a foreign state to particular conduct or litigation should not be a factor in the comity analysis, a foreign state's subjective concerns may affect the foreign relations of the United States. Consequently, where the U.S. Government considers that an extra-territorial discovery order would harm important foreign relations objectives and asks the court to limit discovery accordingly, the court should normally accede to the request. This treatment of foreign relations issues accords with U.S. law, which requires that the courts generally defer to the executive branch in matters relating to U.S. foreign relations.¹⁵¹

In contrast to the comity analysis, this component of the proposed analytical framework does not involve the accommodation of conflicting state interests. It is based on the recognition, however, that at times discovery practices will affect the foreign relations interests of the United States, and it provides a means of considering such political issues. The subjective concerns of a foreign state are taken into account, if at all, by the responsible political officials of the United States Government.¹⁵²

When the analysis is structured in this way, the courts are not placed in the position of having to make political judgments. Political issues are relevant only if the U.S. Government has determined that a particular discovery order should be modified. In those presumably rare cases, the court has only two functions. It must assure that the Government has reasonable grounds for its request, and it must fashion discovery orders that minimize any harm to the fairness rights of individual litigants.¹⁵³

ANALYSIS OF FOREIGN BLOCKING STATUTES

Because foreign states can easily impede U.S. policy by enacting and enforcing blocking legislation,¹⁵⁴ the treatment of such legislation is central to effective analysis of extraterritorial discovery practices. Unfortunately,

¹⁵¹ See, e.g., *United States v. Belmont*, 301 U.S. 324, 330 (1937); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801-08 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985); and *United States v. First Nat'l City Bank*, 96 F.2d 897, 901 (2d Cir. 1968) ("[C]ourts must take care not to impinge upon the prerogatives and responsibilities of the political branches of the government in the extremely sensitive and delicate area of foreign affairs"). See generally Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972).

¹⁵² For a discussion of government decision making involving these issues, see Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again,"* 25 VA. J. INT'L L. 7, 25-33 (1985).

¹⁵³ In effect, this will require judges to keep discovery orders as narrow as is consistent with legitimate government purposes.

¹⁵⁴ According to one court, "A blocking statute is a law passed by the foreign government imposing a penalty upon a national for complying with a foreign court's discovery request." *In re Anschuetz & Co.*, 754 F.2d 602, 614 n.29 (5th Cir. 1985). For discussion of blocking legislation, see, e.g., 1 J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS* §4.17 (1981). As of 1986, 15 states had enacted legislation designed to counter U.S. efforts to secure the production of documents within their territories. See *RESTATEMENT (THIRD)*, *supra* note 5, §442 Reporters' Note 1. For a list of such legislation, see *Bibliography—International Discovery*, 16 N.Y.U. J. INT'L L. & POL. 1217, 1223-26 (1984).

however, judicial analysis of blocking legislation has been fundamentally flawed,¹⁵⁵ and the *Aerospatiale* decision did not significantly improve the situation. The Supreme Court's misguided analysis of this issue can be understood only in light of the conceptual framework to which the Court was responding.

Prior to *Aerospatiale*, blocking legislation was analyzed primarily by application of the so-called foreign sovereign compulsion defense.¹⁵⁶ Originally developed in the context of antitrust enforcement, this doctrine provides that conduct compelled by a foreign sovereign is immune from prosecution in the United States.¹⁵⁷ The defense has been viewed as an extension of the act of state doctrine,¹⁵⁸ and it also has been supported on grounds of fairness and comity.¹⁵⁹

Applying the basic idea behind this doctrine to extraterritorial discovery,¹⁶⁰ the courts have held that discovery orders must be modified so as not to require a national or resident of a foreign state to engage in conduct on foreign territory that is prohibited by that state.¹⁶¹ The foreign sovereign compulsion defense thus has served as a convenient conceptual device to limit the reach of U.S. discovery jurisdiction.

Use of the defense to analyze discovery issues, however, suffers from a fundamental conceptual flaw because it does not provide a mechanism for

¹⁵⁵ See, e.g., Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612 (1979); Note, *Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law*, 63 COLUM. L. REV. 1441 (1963); Comment, *Ordering Production of Documents from Abroad in Violation of Foreign Law*, 31 U. CHI. L. REV. 791 (1964); and Note, *Compelling Production of Documents from Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 VA. J. INT'L L. 747 (1974). See also 1985 Special Commission Report, *supra* note 87, at 1675.

¹⁵⁶ For discussion of this defense, see Meal, *Governmental Compulsion as a Defense under United States and European Community Antitrust Laws*, 20 COLUM. J. TRANSNAT'L L. 51 (1981); Rosdeitcher, *Foreign Blocking Statutes and U.S. Discovery: A Conflict of National Policies*, 16 N.Y.U. J. INT'L L. & POL. 1061 (1984); Timberger, *Sovereign Immunity and Act of State Defenses, Traditional Boycotts and Economic Coercion*, 55 TEX. L. REV. 1, 20-27 (1976); and Note, *International Law—Extraterritoriality—Antitrust Law—Development of the Defense of Sovereign Compulsion*, 69 MICH. L. REV. 888 (1971).

¹⁵⁷ See, e.g., *Interamerican Refining Corp. v. Texaco Maracaibo*, 307 F.Supp. 1291, 1296-99 (D. Del. 1970) (proof of compulsion by Venezuelan regulatory authorities served as a defense to U.S. antitrust action).

¹⁵⁸ See, e.g., *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); and *United States v. Watchmakers of Switz. Information Center, Inc.*, 1963 Trade Cas. (CCH) 70,600, 77,456 (S.D.N.Y. 1963). For discussion, see Meal, *supra* note 156, at 77-82.

¹⁵⁹ See, e.g., *United States v. Vetco, Inc.*, 691 F.2d 1281 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981) (on fairness); *United States v. First Nat'l City Bank*, 396 F.2d 897, 902 (2d Cir. 1968); and *Application of Chase Nat'l Bank*, 297 F.2d 611, 613 (2d Cir. 1962) (on comity).

¹⁶⁰ The same basic justifications have been used regarding discovery. See, e.g., *Compagnie Francaise d'Assurance pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 35 (S.D.N.Y. 1984); and *Schroeder v. Lufthansa German Airlines*, 39 Fed. R. Serv. 2d 211, 212 (N.D. Ill. 1983).

¹⁶¹ See, e.g., *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 345 (7th Cir. 1983); *United States v. Vetco, Inc.*, 691 F.2d 1281, 1287-88 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); and *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980).

accommodating conflicting interests. By merely prohibiting discovery where foreign legislation satisfies certain conditions, the doctrine refers only to the interests of the situs state and does not reflect those of the requesting state. Even more importantly, it does not consider the effects of such legislation on individual litigants.

Indeed, use of this analysis encourages foreign states to enact blocking legislation; it appears to have played a significant role in the increase of such statutes.¹⁶² Consequently, use of the doctrine not only has been analytically flawed, but also has tended to increase the harm that it should have diminished.

To minimize the consequences of using this flawed analysis, United States courts have severely restricted the scope of application of the doctrine.¹⁶³ For example, it has been held that the defense applies only if the defendant can show that it has in good faith taken all reasonable steps to avoid application of the foreign statute.¹⁶⁴ Moreover, the defense has been held to apply only where compliance with the discovery request would require violation of a penal statute¹⁶⁵ that is regularly enforced.¹⁶⁶

In *Aerospatiale* the Supreme Court implicitly rejected use of the foreign sovereign compulsion defense to analyze blocking legislation. Arguing that "blind obedience" to blocking legislation would subject U.S. courts to "control" by foreign states,¹⁶⁷ the Court held that such legislation did not automatically block U.S. discovery orders. Instead, the Court included blocking legislation within the "particularized analysis" of discovery requests.

In rejecting foreign sovereign compulsion as the conceptual tool for analyzing blocking legislation, the Court eliminated a major obstacle to effective analysis of this issue. The Court went on, however, to undermine much of the improvement this step entailed and to create new uncertainty. Apparently still responding to the conceptual framework it was rejecting,¹⁶⁸ the

¹⁶² For discussion, see 1 E. NEREP, *supra* note 54, at 589-603 (1983).

¹⁶³ On the limitations of the defense, see Timberg, *supra* note 156, at 23-27; and Comment, *supra* note 148, at 134-44.

¹⁶⁴ See *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 346 (7th Cir. 1983); *United States v. Vetco, Inc.*, 644 F.2d 1324, 1332 (9th Cir. 1981); and *Graco Inc. v. Kremlin, Inc. & SKM*, 101 F.R.D. 503, 516 (N.D. Ill. 1984). See also Timberg, *supra* note 156, at 23.

¹⁶⁵ See, e.g., *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 211 (1958) ("It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction"). But see RESTATEMENT (THIRD), *supra* note 1, §441 comment c (which indicates that the foreign sovereign compulsion defense applies where "the requirement or prohibition by the first state is backed by criminal or civil liability or both").

¹⁶⁶ See, e.g., *Application of Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962); and *Remington Products, Inc. v. North Am. Phillips Corp.*, 107 F.R.D. 642, 643 (D. Conn. 1985).

¹⁶⁷ *Aerospatiale*, 107 S.Ct. at 2556 n.29.

¹⁶⁸ One part of the Court's analysis involved a fundamental misunderstanding of the international jurisdictional issue. According to the Court, "[T]he language of the statute, if taken literally, would appear to represent an extraordinary exercise of legislative jurisdiction by the Republic of France over a United States District Judge . . ." (emphasis added). *Id.* The

Court stated that blocking legislation could only be considered "to the extent that its terms and its enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of material."¹⁶⁹ The Court apparently intended to use this interest-specification requirement to distinguish between "substantive rules of law" and legislation designed to frustrate U.S. discovery efforts.¹⁷⁰ But the Court failed to recognize that such a requirement is unnecessary where blocking legislation is subsumed in a particularized analysis of all the facts of a given situation.

The Court also failed to perceive a basic inconsistency in its reasoning. At the same time that the *Aerospatiale* opinion established a restrictive and formalistic interest-specification requirement virtually eliminating blocking legislation from consideration in the comity analysis,¹⁷¹ it required courts to consider fairness to litigants. Yet blocking legislation often has a direct impact on the fairness of discovery orders, and thus the interest-specification requirement may be inconsistent with the objective the Court intended to promote. The lack of conceptual structure in the *Aerospatiale* analysis appears to have concealed from the Court this fundamental flaw in its approach to blocking legislation.

Where, as proposed here, blocking legislation is treated primarily as an issue of fairness to litigants,¹⁷² such inconsistency and confusion are eliminated. The analysis focuses instead on the point of impact of blocking legislation on a particular fact situation—namely, its effect on the fairness of the proceedings—and it reduces incentives for foreign states to use blocking legislation to impede U.S. policy.

IV. CONCLUDING PERSPECTIVES

EXTRATERRITORIAL DISCOVERY AND AMERICAN LAW

Where a U.S. court applies discovery procedures to information located in a foreign state, domestic policy objectives can be achieved only with the cooperation of that state. In addition to being able to prohibit compliance with extraterritorial discovery orders, foreign states have every right to

concept of legislative jurisdiction refers, however, to the legal capacity of a state to attach legal consequences to particular conduct. The French blocking statute merely attaches legal consequences to the actions of individuals subject to its jurisdiction. It does not purport to attach legal consequences to the conduct of a U.S. judge.

¹⁶⁹ *Id.*

¹⁷⁰ This distinction derives from the new *Restatement*. See *RESTATEMENT (THIRD)*, *supra* note 5, §442 Reporters' Note 5.

¹⁷¹ Existing blocking statutes do not typically meet the interest-specification requirements. See, e.g., Law Concerning the Communication of Documents or Information of an Economic, Commercial, Industrial, Financial or Technical Nature to Aliens, Whether Natural or Juristic Persons, No. 80-538, 1980 J.O. 1799 (France); and Protection of Trading Interests Act, 1980, ch. 11 (United Kingdom). For discussion, see Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AJIL 257 (1981); Herzog, *The 1980 French Law on Documents and Information*, *id.* at 382; and Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 INT'L LAW. 585 (1981).

¹⁷² See text at notes 62-75 *supra*.

prevent it. This interdependence of states fundamentally alters the legal context in which U.S. courts must operate; to achieve procedural fairness, U.S. courts must exercise their power to order extraterritorial discovery on the basis of principles that effectively accommodate the interests of foreign states.

In its *Aerospatiale* decision, the United States Supreme Court recognized the need to establish principles of restraint that would reflect both the international context of extraterritorial discovery and the interests of foreign states and litigants. It also generally recognized that achieving its goals would require reference to the legitimate expectations of states under international law. The Court failed, however, to provide a conceptual framework within which these goals could be pursued effectively. Moreover, the Court failed to recognize that achieving U.S. goals regarding extraterritorial discovery requires not only appropriate substantive principles, but also appropriate analytical methods.

The analytical framework proposed in this article is designed to achieve the goals of accommodation and effective justice that were identified in *Aerospatiale*. Both the structure and the substance of the proposed framework are specifically adapted to the new legal context created by U.S. extraterritorial discovery practices.

The proposed framework responds to the methodological requirements of this context by providing sufficient conceptual structure to allow analytical clarity as well as reasonable predictability and flexibility in decision making. It provides for analytical clarity by identifying the interests, policies and principles involved in the often complex legal and factual situations created by extraterritorial discovery requests and by relating them to a coherent decision-making framework. It thus separates issues that tend to be mixed together. The foreign relations interests of the United States, the need for accommodation with foreign states, fairness concerns and international law norms—all involve distinct policy goals and thus require separate analysis related to the ends to be served. Where these complexes of issues are not separately identified and courts are asked merely to balance interests on an undefined and unstructured basis, the underlying objectives are unlikely to be given consistently adequate consideration.

The framework of analysis proposed here responds to the need to accommodate foreign interests by providing information to foreign states concerning the factors that courts will consider in reaching decisions on extraterritorial discovery. It assures those states that their interests will be evaluated according to a particular set of principles and allows them reasonably to assess probable judicial responses to particular situations and to actions they might take—e.g., the enactment of blocking legislation.

The substantive principles that inform the analysis are also specifically adapted to the legal context of extraterritorial discovery. The issue of blocking legislation is analyzed, for example, at its specific point of impact on those affected, namely, by reference to its effect on the ability of a litigant to comply with a U.S. discovery order.

Of particular importance is the analysis of comity. Whereas comity is frequently either applied without conceptual structure or given content by reference to vague "general interests," here its content is derived from the only set of principles whose use can make it effective—i.e., principles of international law. This use of international law is unfamiliar because it treats international law not as a source of specific norms of conduct that either are or are not violated, but as an informing principle for domestic decision making. It recognizes that international legal processes determine the expectations of states regarding the activities of other states and therefore must be the cornerstone of any domestic legal analysis that attempts to accommodate those expectations.

ACHIEVING AN EFFECTIVE FRAMEWORK OF ANALYSIS

Achieving widespread acceptance of an analytical framework such as the one proposed here may be as difficult as it is important. The sheer range of factors that may be affected by judicial decisions involving extraterritorial discovery may be an obstacle to the rapid development of a cohesive framework of analysis by the lower courts. An order applying U.S. discovery rules to information located abroad may affect several types of state interests of the United States, a variety of foreign state interests and the interests of actual and potential foreign and domestic litigants. Courts operating without a structured and comprehensive framework of analysis may be inclined to make ad hoc decisions based on factors that appear important in the particular case. Judicial development of a principled analysis may therefore be quite slow.

Judicial structuring will also be impeded by the general lack of opportunity for appellate review of discovery orders. Appellate court opinions are the primary means of developing legal principles in the U.S. system, but lower court rulings relating to extraterritorial discovery will typically be subject to review only where they are without reasonable foundation.¹⁷³ As a consequence, appellate opinions may not perform their normal role in developing conceptual structure.¹⁷⁴

Under these circumstances, inductive generalizations based on limited trial court experience may be particularly misleading. For example, factors not considered or misunderstood in a series of trial court decisions may erroneously be omitted from general principles based on those decisions. Similarly, erroneous interpretations of factual situations by lower courts may be perpetuated in future cases.

¹⁷³ See 8 C. WRIGHT & A. MILLER, *supra* note 118, §2006; and 15 *id.* §3914 (1976). See also *Greyhound Lines, Inc. v. Miller*, 402 F.2d 134, 143 (8th Cir. 1968).

¹⁷⁴ Legal scholarship may aid in the development of structure. Because legal commentators are not subject to the constraints imposed by particular fact situations, they can more easily focus on the development of the principles of analysis. Legal literature may thus be a central source of information about what lower courts are doing, as well as a means of identifying patterns in the resulting data.

Given these obstacles to developing an effective analytical framework through adjudication alone, achieving the goals of *Aerospatiale* may require that elements of structure be prescribed through legislation and/or international cooperation. It must be emphasized that the objective is not to provide fixed rules, but to establish general principles that can guide the adjudicative process.

The most direct and effective means of establishing such principles would be to include them in the Federal Rules of Civil Procedure and in analogous state procedural codes. Many of the relevant principles—e.g., the requirement of procedural fairness—are not open to serious question. Consequently, the main effect of prescribing a framework of analysis would be to clarify the applicability of the principles, to establish their interrelationships and, in so doing, to facilitate their effective use.¹⁷⁵

Analytical principles may also be established through international cooperation. For example, the United States could make agreements with foreign governments on either a bilateral or a multilateral basis concerning principles to be applied to the evaluation of discovery requests.¹⁷⁶ The agreements could designate the framework for analyzing discovery requests involving particular countries or identify the state interests to be considered.

REDUCING CONFLICTS: RESTRAINTS AND ALTERNATIVES

Under the current international legal system, the development of effective legal principles to accommodate the interests affected by the extraterritorial application of U.S. discovery procedures must occur, if at all, in the courts of the United States, because they are virtually the only judicial forums for evaluating these issues. The effort to develop an effective framework of analysis under U.S. law thus becomes particularly critical. Nevertheless, accommodation by means of U.S. litigation is likely to be difficult, costly and time-consuming, owing to the extent and variety of conflicting interests and the inherent limitations on the effective adjudication of such issues by national courts. Consequently, the need to fashion an analytical framework that can perform this function effectively should not obscure the importance of efforts to reduce the need for such litigation.

Through bilateral and/or multilateral agreements states themselves can provide or improve alternatives to U.S. discovery procedures and thus re-

¹⁷⁵ An additional benefit of the process of prescribing general principles is that it may be combined with policy analysis of the importance of pursuing particular objectives. Congress and/or the Supreme Court can face the full range of issues and ask how U.S. state power should be employed in the context of extraterritorial discovery.

¹⁷⁶ For example, foreign governments could provide information on their own interests and procedural systems, and thus make U.S. proceedings less burdensome, less costly and more effective. In addition, foreign states could enter into agreements with the United States about procedures and principles they would apply to U.S. letters of request, and thus allow U.S. courts more effectively to evaluate the consequences of requiring use of the Hague Evidence Convention.

duce incentives for the extraterritorial application of those procedures and perhaps even limit its permissible scope.¹⁷⁷ In particular, the Hague Evidence Convention could be revised to improve its attractiveness to U.S. litigants, and its use could even be required under specified circumstances.¹⁷⁸

* * * *

The United States has chosen to utilize procedures to obtain information located abroad for use in civil litigation that most foreign countries consider unacceptable, at least under some circumstances. Nevertheless, because the United States depends on the cooperation of foreign states to achieve its domestic objectives, the analysis applied by its courts must reflect this interdependence.

To the extent, therefore, that the U.S. legal system develops an effective mechanism for accommodating the interests affected by the extraterritorial application of U.S. discovery procedures, the system of international relationships on which the United States depends for achieving its policy goals will be improved and impediments to its policies will be reduced. To the extent, however, that U.S. courts treat decisions on extraterritorial discovery as exercises in discretionary justice and/or consistently favor U.S. litigants or interests, United States extraterritorial discovery practices will continue to be a source of unfairness, conflict, uncertainty and waste.

¹⁷⁷ For discussion of different interpretations of the Hague Evidence Convention and suggestions for possible improvements, see Gerber, *supra* note 3, at 779-88.

¹⁷⁸ For example, the signatory states could narrow the scope of permissible reservations under Article 23, which would clarify a source of conflict, eliminate confusion and uncertainty, and increase the usefulness of the Convention for American litigators.

NOTES AND COMMENTS

FURTHER THOUGHTS ON THE CHAMBERS PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE

1. The Statute of the International Court of Justice provides for various kinds of Chambers. The special Chambers for dealing with "particular categories of cases; for example, labour cases and cases relating to transit and communications," set up on an *ad hoc* basis (Art. 26, para. 1), originated in the similar Chambers contemplated by the Statute of the Permanent Court of International Justice, which were preconstituted to meet possible postwar requirements for the implementation of the Treaty of Versailles and the other Treaties of Peace, but were never employed in that Court's history of nearly 20 years. There is another type of Chamber, that of summary procedure (Art. 29), which was also inaugurated by the old Court but was employed only once in its history.¹ Neither of these two types of Chambers has ever been resorted to in the International Court of Justice. The Chamber that Judge Schwebel discusses in his recent *Journal* article is an *ad hoc* Chamber for dealing with a particular case, which may be formed at any time by the Court (Art. 26, para. 2), but no such Chamber was known to the old Court.²

2. One of the main problems of the *ad hoc* Chamber, as Judge Schwebel points out,³ is related to Article 17, paragraph 2 of the 1978 Rules of Court, which provides: "the President shall ascertain [the parties'] views regarding the composition of the Chamber, and shall report to the Court accordingly."⁴ This provision may be traced to Article 26, paragraph 1 (then a newly introduced provision) of the 1972 Rules of Court, which stated: "the President shall consult the agents of the parties regarding the composition of the Chamber, and shall report to the Court accordingly."⁵ Criticism of this procedure seems to spring from the apprehension—already evident in the softening from "consult" to "ascertain"—that, if the requirement of the President's inquiry regarding the composition of the *ad hoc* Chamber is meant to signal to the parties that they should propose names of judges, the Court will be dictated to by the parties in the election of the Chamber.

3. As a preliminary to the elections of the Chamber for the case of *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, the Chamber for the *Frontier Dispute* (Burkina Faso/Mali) case and two other recently constituted Chambers, the President did ascertain the views of the parties

¹ Treaty of Neuilly, Article 179, Annex, Paragraph 4 (Interpretation), 1924 PCIJ (ser. A) No. 3 (Judgment of Sept. 12); Interpretation of Judgment No. 3, 1925 PCIJ (ser. A) No. 4 (Judgment of Mar. 26).

² Schwebel, *Ad Hoc Chambers of the International Court of Justice*, 81 AJIL 831, 838-43 (1987).

³ *Id.*

⁴ Reprinted in 73 AJIL 748, 753 (1979).

⁵ Reprinted in 67 AJIL 195, 203 (1973).

"regarding the *composition* of the Chamber," as the Order for the constitution of each Chamber clearly indicated.⁶ The question whether the parties' views concerning the *names* of the judges to constitute the Chamber were ascertained was not expressly addressed by the terms of the respective Orders (Constitution of Chamber), though it could hardly have been otherwise. Furthermore, it is not on official record whether in fact all of these Chambers were composed in accordance with the views of the parties. In the *Gulf of Maine* case, the only authentic indication available with regard to the election of this Chamber was given by my declaration attached to that Order (Constitution of Chamber) of January 20, 1982, where I stated that "it should in my view have been made known that the Court, for reasons best known to itself, has approved the composition of the Chamber entirely in accordance with the latest wishes of the Parties."⁷ In connection with the case of the *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras), Judge Schwebel observed, in quoting my declaration appended to the Order (Constitution of Chamber) of May 8, 1987, that that declaration "may imply that, in this case, [the] process [of election], in [Oda's] view, was not [judicially impartial]."⁸

4. On what ground does the Court under Article 17, paragraph 3 of the Rules of Court elect the judges to compose a Chamber? While, under the Statute of the old Court, consideration of representation of "the main forms of civilization and the principal legal systems of the world" (Art. 9 of the 1920 PCIJ Statute) was to have been assured for the Chambers for labor cases and the cases relating to transit and communications, these requirements were not retained for special Chambers of a similar nature under the International Court of Justice. Moreover, these factors were not relevant from the outset for the Chambers of Summary Procedure of the old Court; the present Court does not seem to take account of any such factor in electing the standing members of the Chamber of Summary Procedure each year. For an *ad hoc* Chamber (this being an innovation of the present Court), these representative requirements are not mentioned either in the Statute or in the Rules of Court.

In the case of all four of the *ad hoc* Chambers that have been constituted during recent years, consideration of "the main forms of civilization and the principal legal systems of the world" apparently was not in the minds of the parties in proposing the judges to sit on the Chamber or of the Court as a whole in electing the Chamber. Excluding national and *ad hoc* judges, the Chamber for the *Gulf of Maine* case had three Western European judges (from France, the Federal Republic of Germany and Italy); the Chamber for

⁶ Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), Constitution of Chamber, 1982 ICJ REP. 3 (Order of Jan. 20); Frontier Dispute (Burkina Faso/Mali), Constitution of Chamber, 1985 ICJ REP. 6 (Order of Apr. 3); Elettronica Sicula S.p.A. (ELSI) (U.S./Italy), Constitution of Chamber, 1987 ICJ REP. 3 (Order of Mar. 2); Land, Island and Maritime Frontier Dispute (El. Sal./Hond.), Constitution of Chamber, 1987 ICJ REP. 10 (Order of May 8).

⁷ 1982 ICJ REP. at 10 (Oda, J., declaration).

⁸ Schwebel, *supra* note 2, at 848.

the *Frontier Dispute* (Burkina Faso/Mali) case, one African (Algeria), one Eastern European (Poland) and one Latin American (Argentina); the Chamber for the *Eletronica Sicula S.p.A. (ELSI)* case (U.S./Italy), two Asians (India and Japan) and one Western European (United Kingdom) (one of the Asians was the then President of the Court); and the Chamber for the *El Salvador/Honduras* case, one Latin American (Brazil), one Asian (Japan) and one Western European (United Kingdom). This record suggests that no consistent geographical consideration has guided the choice of the judges of the Chambers. It may also be asked, when there are five main regions according to United Nations practice, by what criteria is the Court to choose three judges from among these five regions?

5. What, then, should the decisive factor be in electing the judges to constitute an *ad hoc* Chamber, if it is not to be the consideration of "representation of the main forms of civilization and the principal legal systems of the world"? Should it be the political beliefs or the personal abilities of the judges? Or can the consideration that, for reasons of the equitable apportionment of work among judges, a judge should not sit in more than one Chamber at one time be a ground for rejecting a judge? There is no basis for the Court to disregard the wishes of the parties on the grounds of, for example, the personal resistance of some judges to other judges in the Court. I myself cannot believe that anything other than the views of the parties can reasonably be taken into account by the Court in composing the Chamber.

6. Irrespective of whether the parties' views that "the President shall ascertain" under Article 17, paragraph 2 of the Rules of Court should or should not include the actual names of the judges to constitute the Chamber, the parties cannot be denied the opportunity of expressing their views on the concrete composition of the Chamber. I am not suggesting that the Court should relinquish its ultimate power to elect judges of its choice, as corroborated by Article 17, paragraph 3 of the Rules of Court. A judge proposed by the parties may be unable to sit on a Chamber because of health or other legitimate reasons, or may be disqualified under Article 24 of the Statute. Yet there is a clear and cogent probability that, if the parties to any dispute decide to come to an *ad hoc* Chamber instead of the full Court, this will be because, as in the case of an arbitration, they do not want to see the dispute adjudged by a court whose composition may not wholly suit them.

7. If the selection of the judges in the Chamber is made in disregard of the wishes of the parties, they will certainly go to arbitration instead, as the agreements between Canada and the United States in the *Gulf of Maine* case indicated in terms.⁹ While the parties to a case brought before the full Court may be held to a binding acceptance of jurisdiction, this is not possible for parties whose acceptance is conditional pending the formation of a Chamber. The jurisdiction of a Chamber has always been based on the

⁹ Treaty to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area, Canada-United States, with annexed agreements, Mar. 29, 1979, TIAS No. 10,204, Art. II.

immediate consensus of the parties, as the Statute clearly indicates in Article 26, paragraph 3 that "[c]ases shall be heard and determined by the chambers . . . if the parties so request." There is little which can be done to prevent that consensus from dissolving if the parties are dissatisfied with the results of the election held within the Court. I stated my views on the procedure for the election to the Chamber in my declaration in the *El Salvador/Honduras* case as follows:

The Court, being sovereign in judicial proceedings, is free to choose any composition it likes; yet the possibility must also be borne in mind that sovereign States have the legal right to withdraw a case if they prefer a composition different from that determined by the Court. In practical terms, therefore, it is inevitable, if a chamber is to be viable, that its composition must result from a consensus between the Parties and the Court. To ensure that viability, it accordingly behoves the Court to take account of the views of the Parties when proceeding to the election.¹⁰

In fact, this view is nothing new. Judge Jiménez de Aréchaga suggested in his 1972 article, which Judge Schwebel rightly quoted:

[I]t is difficult to conceive that in normal circumstances those Members who have been suggested by the parties would not be elected. For that it would be necessary for a majority of the Members of the Court to decide to disregard the expressed wishes of the parties. This would be highly unlikely since it would simply result in compelling the parties to resort to an outside arbitral tribunal or even to abandon their intention to seek a judicial settlement of the dispute.¹¹

Where they are not prepared to resort to the full Court, the alternatives facing the parties in dispute are: namely, to choose either an *ad hoc* Chamber, whose judges they themselves name, or an arbitration, whose institution is established by the parties.

8. In sum, I submit that an *ad hoc* Chamber of the International Court of Justice may in some measure be equated to an arbitral tribunal that may be set up by an agreement of the states in dispute, although, unlike an arbitration, where the rules of procedure may be determined for each individual case, the proceedings of an *ad hoc* Chamber are governed by the firmly established procedure of the Court and, in addition, the expenses borne by the parties may be less onerous because of the use of the full facilities of the Court. However, the most important difference is that a case submitted to an *ad hoc* Chamber is adjudged in the same way as proceedings before the full Court and is concluded with a judgment that has the same effect as one rendered by the full Court. The *ad hoc* Chamber, a new institution employed by the International Court of Justice, should be examined from this point of view. In other words, it should be asked if it is appropriate for an *ad hoc* Chamber, which in its genesis and orientation so resembles an arbitral

¹⁰ 1987 ICJ REP. at 13 (Oda, J., declaration).

¹¹ Jiménez de Aréchaga, *The Amendments to the Rules of Procedure of the International Court of Justice*, 67 AJIL 1, 2-3 (1973), quoted in Schwebel, *supra* note 2, at 841.

tribunal, to be able to give a judgment, elements of which, like the judgments of the Court as a whole, constitute jurisprudence of the Court.

9. In this regard, it may be pertinent to examine the manner in which the concept of an *ad hoc* Chamber, unknown to the Permanent Court of International Justice, was introduced in the Statute of the new Court. At the Committee of Jurists that met in Washington in April 1945 to reexamine the Statute of the Court, the Statute of the old Court was only modestly revised.¹² The United States submitted a proposal, containing an additional paragraph in Article 26, which read: "The Court may from time to time form one or more chambers for dealing with particular cases or with particular categories of cases. . . . If the parties so request, cases will be heard and determined by such chambers."¹³ In the introductory note to this document, the following explanation was given for this particular provision: "Provision is made for the establishment of chambers, superseding the special chambers provided for by Articles 26 and 27 of the present Statute." The United Kingdom made the following suggestion regarding Chambers: "*Articles 26 and 27.* As the special chambers for labour and transit cases have never been employed, it is suggested that these provisions should be replaced by conferring a general faculty on the Court to constitute special chambers in such cases as may seem appropriate."¹⁴

The committee, under the chairmanship of Green H. Hackworth, who later became a judge and President of the Court, held discussions on the Chamber, in which he explained that

in the United States proposals Article 26 of the present Statute is omitted and . . . two short paragraphs are substituted.

. . . .
The Chairman thought . . . Articles 26 and 27 of the Statute have never been used. Under the United States proposals, chambers of the Court are made available to deal with any type of case. He suggested that the relevant articles of the United States proposals should be read together before reaching a decision.

. . . .
Ambassador Castro (El Salvador) . . . agreed to the United States proposal on the understanding that labor cases may freely be brought before the Court on the same footing as other cases

. . . .
Minister Novikov (Soviet Union) considered that the American proposal was intended to deal with all classes of cases and, therefore, should be supported.¹⁵

The Chairman appointed a subcommittee to submit a report on this article.¹⁶ The subcommittee unanimously recommended that Article 26 should be revised as follows:

¹² 14 UNCIO Docs. (1945).

¹³ Doc. Jurist 5, G/5, *id.* at 323, 334.

¹⁴ Doc. Jurist 14, DP/4, *id.* at 314, 317.

¹⁵ Doc. Jurist 46(22), G35, *id.* at 117, 122-23.

¹⁶ *Id.* at 124.

The Court may from time to time form one or more chambers, composed of . . . judges, for dealing with particular cases or with particular categories of cases, such as labor cases and cases relating to transit and communications. If the parties so request, such cases will be heard and determined by those chambers.¹⁷

The committee continued its debate.

[Judge Hudson] thought the subcommittee was proposing a wholly different system when it provided for *ad hoc* appointment of chambers with the approval of the parties. . . .

. . . .
[Judge Hudson] thought that there might be an advantage in having *ad hoc* chambers if the number of judges available fell below a quorum for the full Court.

. . . .
Mr. Bathurst (United Kingdom), Rapporteur of this subcommittee, explained its report. The subcommittee recommended that the provisions in Articles 26 and 27 for labor, transit, and communication chambers should be replaced by a general provision permitting the Court to establish chambers to deal with particular cases or particular classes of cases. . . .

Ambassador Cordova (Mexico) said . . . that it might be desirable to distinguish between *ad hoc* chambers in which the number of judges was left open and chambers to deal with particular classes of cases for which the number of judges might be fixed.

. . . .
Judge Hudson suggested the desirability of adopting Ambassador Cordova's suggestion regarding chambers. . . .

Dr. Moneim-Riad Bey (Egypt) felt that it was necessary to distinguish between pre-existing and *ad hoc* chambers and to fix a minimum number of members for chambers.

. . . .
[Dr. Moneim-Riad Bey (Egypt)] suggested that the question of *ad hoc* and fixed chambers should be further considered.

. . . .
Articles 26, 27, 29, and 30 were approved as a whole, subject to the consideration of the Drafting Committee.¹⁸

These were the principal points that were made at the Washington Committee of Jurists concerning the nature of the *ad hoc* Chamber.

10. The drafting of the provision of the Statute in 1945 concerning an *ad hoc* Chamber, as described above, does not provide sufficient explanation of the basis upon which this institution was to be formed, or of the manner in which it was to be resorted to, especially since the Chamber for dealing with particular categories of cases and the five-judge Chamber of Summary Procedure were retained from the old Court. While the American and Soviet statements, quoted above, contained in the *travaux préparatoires* may suggest otherwise, perhaps it may not be incorrect to assume that an *ad hoc* Chamber

¹⁷ Doc. Jurist 23, G/17, *id.* at 282.

¹⁸ Doc. Jurist 57, G/45, *id.* at 199-202.

was envisaged principally to adjudge minor cases that might not be required to go through the complete proceedings of the full Court. This idea seems to linger in the 1978 Rules of Court, Article 92 of which states: "1. Written proceedings in a case before a Chamber shall consist of a single pleading by each side. . . . 3. Oral proceedings shall take place unless the parties agree to dispense with them, and the Chamber consents."¹⁹

As shown below, however, the practice has proved otherwise. The *Gulf of Maine* case (1984), the first dealt with by an *ad hoc* Chamber, required three rounds of written pleadings exchanged between Canada and the United States, amounting to nearly 15,000 pages of written documents in total, and as many as 26 sittings for oral arguments. The *ad hoc* Chamber's Judgment went on record as a piece of jurisprudence concerning maritime delimitation comparable to other law of the sea cases such as the *North Sea Continental Shelf Cases* (1969), the *Tunisia/Libya* case (1982) and (later) the *Libya/Malta* case (1985), all of which were adjudged by the full Court.²⁰ To look no further than the first *ad hoc* Chamber case, therefore, it is clear that the jurisprudential impact of the new institution cannot be overlooked. Such considerations, however, go well beyond my present theme.

11. As a Member of the Court, I feel it appropriate to abstain from developing any basic criticisms directed at the very institution of an *ad hoc* Chamber. I content myself, therefore, with reiterating that states come to an *ad hoc* Chamber, by agreement, because they feel free to indicate their choice of judges from among the Members of the Court. At the same time, they are perfectly entitled to enjoy the full services and facilities of the Court and have their *ad hoc* Chamber render a judgment of the International Court of Justice.

SHIGERU ODA*

WALDEMAR A. SOLF (1913-1987)

The death of Waldemar Solf on June 20, 1987, brought to a close a multifaceted career that included stints as practicing lawyer in Chicago, field artillery officer in World War II, supervisor of the U.S. Army's international legal affairs and professor of international law. While he was a member of the army's Judge Advocate General's Corps (JAG), Solf served in Germany, and also in South Korea where he was Staff Judge Advocate of the Eighth U.S. Army/U.S. Forces Korea/United Nations Command and the U.S. Strike Command. He later served in the United States as the Chief Judicial Officer, U.S. Army Judiciary, and then as the Chief, Military Justice Division, Office of the Judge Advocate General.

¹⁹ See 73 AJIL at 777-78.

²⁰ North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3 (Judgments of Feb. 20); Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 ICJ REP. 18 (Judgment of Feb. 24); Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 ICJ REP. 13 (Judgment of June 3).

* Member of the International Court of Justice; Honorary Member, American Society of International Law.

After 2 years of teaching international law at American University, Solf rejoined the JAG as a civilian and for 10 years served as Chief of the International Law section in the International Affairs Division. He was assigned to be a U.S. delegate to the International Committee of the Red Cross's Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. He retired again in August 1979, and then became Adjunct Professor of Law at Washington College of Law, American University.

Solf's participation in the ICRC conferences, extending from 1972 to their conclusion in 1977, and in the follow-on conferences leading to prohibitions on conventional weapons, was marked by the painstaking research that he engaged in for all of his efforts. This research enabled him to become an effective dialectician who could deftly promote his positions. Solf was also an effective participant on the delegations: he was widely respected, in great demand for the luncheon and dinner sessions where the shaping of perceptions so often takes place. From the outset, he strongly supported the institutional mechanism—the establishment of the protecting power—that would provide enforcement of the Geneva Conventions and monitor compliance. He also supported the U.S. efforts to abolish the reservations to the Conventions—particularly those that would make a prisoner of war, when captured, *prima facie* a war criminal until evidence was adduced otherwise.

Solf's numerous articles and participation were a major factor in the development of the law of war, significant in large measure because his research was effectively coupled with his broad and pragmatic experience in the practice of this field of law. He also was an active participant in the development of the law relating to terrorism and other international crimes, extradition, and, of course, military law and military justice. In recognition of his work in the ICRC conferences and in general, he received the Exceptional Civilian Service Award in 1978 and the Meritorious Civilian Service Award in 1975. He received recognition as well for his prominent role in several professional associations.

In addition, he was a superb teacher, both of students in the classroom and as a colleague or friend, discussing the difficult points that are inherent in the law of war. He insisted that the law regulating states in war was the law of war and avoided the ambiguous expression "international humanitarian law" because he saw that the law of war itself was aimed at reducing the "unnecessary suffering" that arises out of the hostilities. Solf observed that the "law of Geneva" was addressed to the protection of noncombatants in situations outside the hostilities. Hence, in his view, much of the Geneva law was intended to promote and effectuate the enforcement of the rights of the noncombatants—human rights in the larger sense.

In apt conclusion to his work on the law of war, Solf became a consultant to the ICRC, and also joined with Professors Karl Joseph Partsch and M. Bothe in completing the text, *New Rules for Victims of Armed Conflicts*, on the Geneva Protocols of 1977. Together with Captain J. Ashley Roach (USN), he updated the *Index of International Humanitarian Law*, which was published after his death. His death cut short the completion of an excellent text for teaching the law of war, which he was coauthoring with Professor Robert

Goldman of Washington College of Law. This text draws upon the Jessup problem of 1978, of which Solf was one of the authors. In general, the Jessup problems offer a unique model that others may yet choose to follow, for they provide perspective on the often sequential nature of the issues we face in international law.

We have relatively few experts in the law of war, so critical to the development of global order, who can couple work of impeccable scholarship with the experience of the practitioner. Wally Solf was one of these few.

HARRY H. ALMOND, JR.*

CORRESPONDENCE

The *American Journal of International Law* welcomes short communications from its readers. It reserves the right to determine which letters should be published and to edit any letters printed. Letters should conform to the same format requirements as other manuscripts.

TO THE EDITOR IN CHIEF:

May 5, 1988

I would like to respond to Professor Alain Pellet's letter in the April 1988 issue (82 AJIL 331) lamenting the fact that out of 2,880 footnotes in a recent volume of the *American Journal of International Law*, only 41 cited references in French. Professor Pellet concludes that the American authors "certainly deprive themselves of the indispensable comparative dimension," and that "navelism" of this sort "might be the way empires collapse."

Professor Pellet might do well to inquire why foreign sources are conspicuous by their relative absence in AJIL footnotes. A look upward at the text of recent essays in our *Journal* reveals sharp controversy over the legality of actions taken and positions asserted by the Government of the United States. There has been not only robust criticism of the legality of what our Government has done, but challenge as well to the versions of the facts that have been officially reported. For instance, some of our colleagues—at personal risk—have traveled to Nicaragua to report on what the contras have been doing with U.S. aid. In addition, some of our colleagues have participated in legal actions against the Government of the United States in our courts and in international courts.

The essays that result from this kind of legal activism—whether they support or challenge the Government's position—challenge comfortable assumptions about the nature and sources of international law. As French thinkers historically have been among the first to realize, sharply contested expositional positions help articulate and stimulate the development of doctrine.

Frankly, I do not see very much that is new or challenging in French scholarship at the present moment. When we were having our clashes over

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Grenada and Nicaragua, why were the French journals not debating the facts and legality of the *Greenpeace* affair? Where was the debate over France's withdrawal from the general compulsory jurisdiction of the International Court of Justice after the *Nuclear Tests* cases? Are international lawyers in France collectively timid about criticizing their own Government? Or are the editors of French journals unwilling to publish iconoclastic essays submitted by unestablished authors? The absence of critical examination of issues such as *Greenpeace* in the leading French journals of international law not only discourages American scholars from reading and citing those journals, but also removes an opportunity for French scholars to engage in the intellectual challenge of reexamining the conceptual underpinnings of public international law as interpreted on the continent.

ANTHONY D'AMATO*

THE FRANCIS DEÁK PRIZE

The Board of Editors takes great pleasure in announcing that the Francis Deák Prize for 1988 has been awarded to the French scholar, Elisabeth Zoller, for her article, *The "Corporate Will" of the United Nations and the Rights of the Minority*. The winning article appeared in the July 1987 issue of the *Journal* at page 610.

The prize, which is given annually in memory of Francis Deák, honors meritorious scholarship by younger AJIL authors. The Board of Editors is grateful to the Institute for Continuing Education in Law and Librarianship and to its President, Mr. Philip F. Cohen, whose continued generosity has made it possible to grant an award to the recipient of the prize. The Board also wishes to extend its congratulations to Professor Zoller for her outstanding scholarship.

* Of the Board of Editors.

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN NASH LEICH*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

RECOGNITION OF GOVERNMENTS

(U.S. *Digest*, Ch. 2, §3)

Economic Measures Against the Illegal Noriega Regime in Panama

On February 25, 1988, President Eric Arturo Delvalle of Panama dismissed from his post as Commander of the Panama Defense Forces General Manuel Antonio Noriega, against whom (and others) United States grand juries in Miami and Tampa had returned indictments on February 4, 1988, for violations of U.S. narcotics laws (in sum, by facilitating the transit of narcotics shipments from Colombia to the United States through Panama and by participating or conspiring to participate in various money-laundering schemes in Panama).¹

Even prior to the investigations that had led to the indictments in Miami and Tampa, concern had grown within the executive branch and Congress about deteriorating political and human rights conditions in Panama. This concern was directed not only toward the dominant role of the Panama Defense Forces in Panamanian Government operations, but also toward their use of excessive measures in quelling demonstrations, their intimidation of political opponents, including their alleged complicity in the unsolved murder (and decapitation) of an insistent critic, Dr. Hugo Spadafora, and the reported widespread corruption of their officers.²

On June 30, 1987, the American Embassy in Panama had been attacked during a demonstration orchestrated by the Panamanian Government, with resultant damages of \$106,000. The United States Government informally withheld disbursement of assistance to Panama until the Panamanian Government paid for the damages to the Embassy. Payment was made on July 29, but in the meantime consensus had been reached at high levels of the executive branch that military and economic assistance should continue to be withheld until Panamanian authorities (in particular, the Panama De-

* Office of the Legal Adviser, Department of State.

¹ For a summary of the indictments, see Dept. of Justice news release, Feb. 5, 1988, also in Dept. of State File No. P88 0056-1708.

² See *Situation in Panama: Hearings Before the Subcomm. on Western Hemisphere Affairs of the Senate Comm. on Foreign Relations*, 99th Cong., 2d Sess. (1986). See in particular *id.* at 38-43, reprinted in *AMERICAN FOREIGN POLICY: CURRENT DOCUMENTS*, 1986, at 792-95.

fense Forces) ended their abuses of human rights and democratic governmental processes were restored. Secretary of State George P. Shultz made the suspension public at a news conference on August 6, 1987.³

Noriega, following his own dismissal by President Delvalle, thereupon brought about the purported dismissal of President Delvalle and Vice President Roderick Esquivel by a rump session of the Panamanian National Assembly (meeting for 10 minutes in the early morning hours of February 26, 1988). He also brought about the purported appointment by the Cabinet Council of Manuel Solís Palma as "Minister in Charge of the Presidency of the Republic."⁴

On March 1, 1988, President Delvalle, who had gone into hiding in Panama, issued a proclamation advising all persons and parties engaging, or considering engaging, in transactions with the Government of the Republic of Panama or with the Republic of Panama that any contracts, agreements or other transactions entered into with the Noriega regime or any public agency or entity purporting to act on its behalf were neither recognized by nor binding upon the Government of the Republic of Panama or the Republic of Panama, and that any persons or parties entering into them did so at their own risk. Any debts or other obligations incurred by the Noriega regime or any public agency or entity purporting to act on its behalf were neither recognized by nor binding upon the Government of the Republic of Panama and the Republic of Panama. Any taxes, fees or other payments paid to the Noriega regime or any public agency or entity purporting to act on its behalf would not be credited as a payment to the Government of the Republic of Panama, and any person or party making such payments would be reassessed therefor, "as appropriate," by the Government of the Republic of Panama. The final operative paragraph of the proclamation stated:

4. Payments of debts, taxes, fees or other obligations due and owing to the Republic of Panama, the Government of the Republic of Panama or any public agency or entity thereof should be held, until further notice, in escrow in trust for the Republic of Panama.⁵

On March 2, 1988, counsel representing the lawful Government of Panama began filing suits in several jurisdictions in the United States to establish title to the Panamanian Government's bank deposits and to prevent banks holding those deposits from turning them over to the Noriega regime.

In a note dated March 2, 1988, the Embassy of the Republic of Panama at Washington notified the Department of State that Ambassador Juan

³ See DEPT. ST. BULL., No. 2127, October 1987, at 11, 13. For a further statutory prohibition on assistance to Panama, see p. 574 *infra*.

⁴ On Feb. 25 and 26, 1988, the White House issued statements reiterating the "unqualified support of the United States for civilian constitutional rule in Panama." See 24 WEEKLY COMP. PRES. DOC. 263, 265 (Feb. 29, 1988). See also the statement of Ambassador Richard T. McCormack, U.S. Permanent Representative to the Organization of American States, Feb. 27, 1988, before a Special Session of its Permanent Council, OEA/Ser.G, CP/Acta 729/88 (1988).

⁵ For the text, see Dept. of State File No. P88 0058-1104.

Bautista Sosa was the sole person having authority to receive, control or dispose of any property held in any Federal Reserve Bank or any insured bank from or for the account of the Republic of Panama or any central bank thereof, including Banco Nacional de Panamá and Caja de Ahorros. On the same date, Acting Secretary of State John C. Whitehead certified, in accordance with section 25(b) of the Federal Reserve Act, as amended (12 U.S.C. §632 (1982)), "to any Federal Reserve bank or to any insured bank" that he recognized and accepted the authority of Ambassador Sosa with respect to such property.⁶

On March 2, 1988, Judge Lloyd F. MacMahon of the Southern District of New York issued a temporary restraining order, in *Republic of Panama v. Republic National Bank of New York*,⁷ enjoining the defendant bank from debiting any account of the Republic of Panama. The plaintiff subsequently filed an amended complaint naming Bankers Trust Co., Irving Trust Co. and Marine Midland Bank as defendants. The same day, March 2, Republic agreed to transfer all funds in the account of the Republic of Panama to the Federal Reserve Bank of New York, and the action against Republic was dismissed. On March 3, 1988, the court granted a temporary restraining order that enjoined the three remaining defendants from debiting any account of the Republic of Panama unless approved by Ambassador Sosa, and also enjoined payment on any letters of credit or like instruments in the name of the Republic of Panama or any of its agencies or instrumentalities. After Irving Trust Co. stipulated with the plaintiff not to pay against any account of the Republic of Panama except payments under outstanding letters of credit, the action was dismissed against Irving.

On March 7, 1988, Judge MacMahon extended the temporary restraining order against Bankers Trust Co. and Marine Midland Bank for 10 more days, and took under advisement the plaintiff's application for a preliminary injunction. In an opinion dated March 15, 1988, the court granted the preliminary injunction, recognizing the "well-established" rule of judicial deference to the executive branch in regard to questions of recognition. "As a corollary" to that deference in determining "whom to accredit as repre-

⁶ *Id.* Nos. P88 0059-0376 and P88 0059-0373. The certification related to and included all gold, silver, currency, credits, deposits, securities, choses in action, and any other form of property, the proceeds thereof, and any right, title, or interest therein, theretofore or thereafter received by any Federal Reserve bank or insured bank, from or for the account of the Government of Panama or any of its agencies or instrumentalities, including Banco Nacional de Panamá, as its fiscal agent. The certification encompassed the following premises: that Panama is a foreign state recognized by the United States Government; that Ambassador Sosa is its Ambassador to the United States and is recognized by the Secretary of State as its accredited representative; that Ambassador Sosa had certified to the Secretary of State in the note dated Mar. 2, 1988, referred to in the text *supra*, his full control and authority to receive, control, and dispose of any and all such property; and that the Secretary of State accepted and recognized Ambassador Sosa's full power and authority in these respects.

On Apr. 1, 1988, Acting Secretary of State Whitehead delegated his authority to make section 25(b) certifications with respect to Panama to the Assistant Secretary of State for Inter-American Affairs, effective Apr. 4, 1988. 53 Fed. Reg. 12,092 (1988).

⁷ No. 88 Civ. 1427 (LFM) (S.D.N.Y. Mar. 2, 1988).

sentatives of a foreign state," it held, U.S. courts would not hear suits by governments from which official recognition had been withheld.⁸

Subsequently, on March 25, 1988, President Delvalle issued Executive Decree No. 16, in regard to payment of Panamanian income taxes falling due on March 31, 1988. It extended the due date to April 30, required all tax payments to be made only through deposits to the order of the Government of the Republic of Panama in the Federal Reserve Bank of New York, and provided that any income tax payment made in a manner different from that prescribed would not be deemed good payment. Acting on behalf of President Delvalle, Ambassador Sosa then asked the Internal Revenue Service to announce that all payments of Panamanian income taxes in accordance with Executive Decree No. 16 would be entitled to the foreign tax credit provided for in sections 901 and 902 of the Internal Revenue Code of 1986.

Following consultations among the Departments of State and the Treasury and the Federal Reserve Bank of New York, Government of Panama Account No. 2 was opened at the bank for the purpose, inter alia, of receiving tax payments made pursuant to Executive Decree No. 16, subject to an irrevocable instruction from Ambassador Sosa that no payments be made therefrom, unless the Secretary of State, or his lawful delegate, have first notified the bank in writing that "constitutional order has been restored in Panama." On April 1, 1988, the Internal Revenue Service issued Notice No. 88-47, stating, in part, that

income taxes due to the Government of Panama which are paid into [Government of Panama Account No. 2 at the Federal Reserve Bank of New York] will be considered paid to the Government of Panama, and will therefore be creditable foreign taxes if all other requirements of sections 901 and 902 of the Code are satisfied.⁹

AIRCRAFT CRIMES

(U.S. *Digest*, Ch. 8, §3)

Multilateral Conventions—Montreal Protocol

On May 6, 1988, Secretary of State George P. Shultz submitted a report to President Reagan on the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal on February 24, 1988, which supplements and extends the Convention

⁸ See *Republic of Panama v. Republic Nat'l Bank of New York*, 681 F.Supp. 1066 (S.D.N.Y. 1988). See also *Republic of Panama v. Citizens & S. Int'l Bank*, 682 F.Supp. 1544 (S.D. Fla. 1988); *Republic of Panama v. First Nat'l Bank of Boston*, No. 88-0518-H (D. Mass.) (in which District Judge Edward F. Harrington granted a temporary restraining order on Mar. 3, 1988; the case was settled prior to a hearing on the application for a preliminary injunction and dismissed on Mar. 11, 1988).

⁹ IRS BULL., No. 1988-16, Apr. 18, 1988, at 27-28.

for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), done at Montreal on September 23, 1971.¹

The United States played a leading role in negotiation of the Protocol, preparation of which began late in 1986, after the Assembly of the International Civil Aviation Organization (ICAO) unanimously called for a new international instrument to suppress unlawful acts of violence at airports serving international civil aviation. The ICAO Assembly's action followed several terrorist incidents at international airports, in particular the attacks in December 1985 at the Rome and Vienna airports that resulted in the deaths of 20 persons, including 5 Americans. A subcommittee of the ICAO Legal Committee and the full Legal Committee met in January 1987 and April-May 1987, respectively, to develop the Protocol. Its final text was adopted by consensus by 81 nations at an International Conference on Air Law, held under ICAO auspices at Montreal, February 9-24, 1988.

The Secretary's report reads in part as follows:

The Protocol is an important instrument that will enhance international cooperation in combatting acts of terrorist violence. . . .

The Protocol will . . . encompass unlawful acts of violence committed at airports serving international civil aviation, even where such acts do not endanger the safety of aircraft in flight. Pursuant to Article I of the Protocol, as between the parties to the Protocol, the Montreal Convention and the Protocol will be read and interpreted as a single instrument.

The Montreal Convention, now in force for 137 nations, was the third major step taken by the international community to deal with terrorist attacks and other criminal acts against civil aviation. The Convention on Offenses and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on September 14, 1963, entered into force in 1969. The Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking Convention), signed at the Hague on December 16, 1970, entered into force in 1971. The United States is a party to all three of these Conventions.

The major provisions of the Protocol are as follows:

Paragraph 1 of Article II sets forth the offenses covered by the Protocol and will be Article 1, paragraph 1 *bis* for the parties to the Montreal Convention as supplemented by the Protocol. This article states that any person commits an offense if he unlawfully and intentionally, using any device, substance or weapon (a) performs certain acts of violence at an international airport or (b) destroys or seriously damages the facilities of an international airport or aircraft not in service located thereon, or disrupts service at that airport. To be an offense under this provision, the Protocol requires that these acts endanger or be likely to endanger safety at an airport serving international civil aviation.

¹ 24 UST 564, TIAS No. 7570 (entered into force for the United States Jan. 26, 1973).

Paragraph 2 of Article II provides that the words "or paragraph 1 *bis*" will be inserted after the words "paragraph 1" in paragraph 2(a) of Article 1 of the Convention. Through this amendment, the supplemented Montreal Convention will also include as offenses (a) attempts to commit any of the acts listed in paragraph 2 of Article II of the Protocol and (b) complicity in such acts or attempts.

Article III of the Protocol adds a paragraph 2 *bis* to Article 5 of the Convention. Under this new paragraph, each party agrees to take measures to establish jurisdiction over the offenses mentioned in the Protocol, where an alleged offender is present in its territory and it does not extradite him pursuant to Article 8 of the Convention.

Articles IV through VII set out the procedures for signature, ratification, accession and entry into force of the Protocol. . . .

Because the Protocol includes an offense not currently part of U.S. domestic law, it will require implementing legislation before the United States can become a party. This legislation is now being prepared.²

ECONOMIC SANCTIONS

(U.S. *Digest*, Ch. 10, §12)

Measures Against the Illegal Noriega Regime in Panama

On February 29, 1988, President Reagan signed the certifications regarding major illicit drug-producing or major drug-transit countries required by section 481(h)(2)(A) of the Foreign Assistance Act of 1961, as amended.¹ The provision mandates the withholding of United States assistance to such countries unless the President determines, and so certifies to Congress at the time of submitting an annual international narcotics control report, that during the previous year the country in question has cooperated fully with the United States, or has taken adequate steps on its own, in preventing narcotic or other psychotropic drugs and other controlled substances produced or processed, in whole or in part, in that country, or transported through it, from being sold illegally within that country's jurisdiction to U.S. Government personnel or their dependents, or from being transported, directly or indirectly, into the United States. The certification must also address the country's cooperation in preventing and punishing the laundering in the country of drug-related profits or drug-related monies. If

² Dept. of State Files L/T. On May 20, President Reagan forwarded the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation to the Senate for advice and consent to ratification. S. TREATY DOC. NO. 19, 100th Cong., 2d Sess. (1988).

For the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, *done* Sept. 14, 1963, see 20 UST 2941, TIAS No. 6768, 704 UNTS 219. For the Convention for the Suppression of Unlawful Seizure of Aircraft, *done* Dec. 16, 1970, see 22 UST 1641, TIAS No. 7192.

¹ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §2005, 100 Stat. 3207, 3207-61-63 (1986) (codified at 22 U.S.C. §2291(h)(2)(A)).

the country does not otherwise qualify for certification under these standards, assistance may be obligated and expended, nevertheless, if the President certifies that the vital national interests of the United States require provision of that assistance. Either type of presidential determination may be disapproved by Congress by joint resolution within a 45-day period of continuous session after receipt of the President's certification (22 U.S.C. §2291(h)(4)(A)).

In Presidential Determination No. 88-10, signed February 29, 1988, the President determined, among other things, that four major producing and/or major transit countries, among them Panama, did not meet the standards set forth in section 481(h)(2)(A).²

Subsequently, on March 11, 1988, President Reagan discussed measures that he would place in effect against the "illegitimate Noriega regime" until democratic government was restored in Panama. Certain payments due Panama from the Panama Canal Commission were to be placed in escrow. Trade preferences available to Panama under the Generalized System of Preferences (GSP) and the Caribbean Basin Initiative (i.e., under the Caribbean Basin Economic Recovery Act) would be suspended.³ The Immigration and Naturalization Service and the U.S. Customs Service would intensify their scrutiny of Panamanians in order to apprehend drug traffickers and money launderers. All sources of funds due or payable to the Republic of Panama from the United States Government were to be inventoried, for the purpose of determining those that should be placed in escrow for the Delvalle Government on behalf of the Panamanian people. The President concluded:

We have welcomed the recent statements issued by President Delvalle, the political parties and the Civilian [Civic] Crusade of Panama calling for a government of national reconciliation. We support their goal of restoring democratic government and constitutional order. Once Panamanians achieve this goal, the United States is fully prepared to work with the Government of Panama to help quickly restore Panama's economic health. The United States has been, and remains, committed to fulfilling faithfully its obligations under the Panama Canal treaties. We are also prepared to resume our close

² 53 Fed. Reg. 11,487 (1988).

³ Proclamation No. 5779, *id.* at 9,850, dated Mar. 23, 1988, denied until further notice the preferential tariff treatment afforded under the Generalized System of Preferences and the Caribbean Basin Economic Recovery Act to articles otherwise eligible for such treatment that are imported from Panama.

The President's action was undertaken pursuant to §802(a) under title VIII of the Trade Act of 1974, 19 U.S.C. §2492(a), as added by title IX (Denial of Trade Benefits to Uncooperative Major Drug Producing or Drug-Transit Countries) of the Anti-Drug Abuse Act of 1986, *supra* note 1, 100 Stat. 3207-164. The provisions of title VIII, known as the Narcotics Control Trade Act, authorize restrictive tariff treatment to be given products of uncooperative major producing or drug-transit countries. Under §803 of the Trade Act of 1974, as added by Pub. L. No. 99-570, no allocation may be made of any limitation imposed on the quantity of sugar (that may be imported into the United States) to any country having a government that is involved in the trade of illicit narcotics or that is failing to cooperate with the United States in narcotics enforcement activities as defined in §802(b), as determined by the President.

working relationships with the Panamanian Defense Forces once civilian government and constitutional democracy are reestablished.⁴

On April 8, 1988, President Reagan imposed economic sanctions, including the blocking of assets, against the Noriega regime in Panama. Acting under his constitutional authority and under the International Emergency Economic Powers Act, the National Emergencies Act, and 3 U.S.C. §301, the President found in Executive Order No. 12,635, Prohibiting Certain Transactions with Respect to Panama, that the policies and actions in Panama of Manuel Antonio Noriega and Manuel Solís Palma constitute an unusual and extraordinary threat to the national security, foreign policy and economy of the United States; and he declared a national emergency to deal with that threat. The operative provisions of the order follow:

Section 1. I hereby order blocked all property and interests in property of the Government of Panama that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of persons located within the United States. For purposes of this Order, the Government of Panama is defined to include its agencies, instrumentalities and controlled entities, including the Banco Nacional de Panama and the Caja de Ahorros.

Sec. 2. Except to the extent provided in regulations which may hereafter be issued pursuant to this Order:

(a) Any direct or indirect payments or transfers from the United States to the Noriega/Solis regime of funds, including currency, cash or coins of any nation, or of other financial or investment assets or credits are prohibited. All transfers, or payments owed, to the Government of Panama shall be made into an account at the Federal Reserve Bank of New York, to be held for the benefit of the Panamanian people. For purposes of this Order, the term "Noriega/Solis regime" shall mean Manuel Antonio Noriega, Manuel Solis Palma, and any agencies, instrumentalities or entities purporting to act on their behalf or under their asserted authority.

(b) Any direct or indirect payments or transfers to the Noriega/Solis regime of funds, including currency, cash or coins of any nation, or of other financial or investment assets or credits, by any United States person located in the territory of Panama, or by any person organized under the laws of Panama and owned or controlled by a United States person, are prohibited. All transfers, or payments owed, to the Government of Panama by such persons shall be made into an account at the Federal Reserve Bank of New York, to be held for the benefit of the Panamanian people. For purposes of Section 2(b), "United States person" is defined to mean any United States citizen, permanent resident alien, juridical person organized under the laws of the United States, or any person in the United States.

Sec. 3. Sections 1 and 2 shall not be deemed to block property or interests in property of the Government of Panama, including, but not limited to, accounts established at the Federal Reserve Bank of New

⁴ 24 WEEKLY COMP. PRES. DOC. 328 (Mar. 14, 1988).

York as described in section 2, with respect to which transactions are authorized by, or on behalf of, the recognized representative of the Government of Panama as certified by the Secretary of State, or are otherwise authorized in regulations which may hereafter be issued pursuant to this Order. Section 2 shall not be deemed to prohibit interbank clearing payments.

Sec. 4. The measures taken pursuant to this Order are intended to extend the effectiveness of actions initiated in cooperation with the Government of Panama and its President, Eric Arturo Delvalle, and are not intended to block private Panamanian assets subject to the jurisdiction of the United States or to prohibit remittances by United States persons to Panamanian persons other than the Noriega/Solis regime.

Sec. 5. This Order shall take effect at 4:00 p.m. Eastern Daylight Time on April 8, 1988, except as otherwise provided in regulations issued pursuant to this Order.

Sec. 6. The Secretary of the Treasury, in consultation with the Secretary of State, is authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to me by the International Emergency Economic Powers Act, as may be necessary to carry out the purposes of this Order. The Secretary of the Treasury may redelegate any of these functions to other officers or agencies of the Federal Government.

Sec. 7. Nothing contained in this Order shall confer any substantive or procedural right or privilege on any person or organization, enforceable against the United States, its agencies or its officers, or the Federal Reserve Bank of New York or its officers.⁵

The economic measures described above were undertaken by the President under his constitutional authority and under the statutory authorizations and mandates referenced, after Noriega had sought to depose President Delvalle. Prior to the events of February 1988, however, Congress had enacted statutory prohibitions against the obligation or expenditure of any U.S. assistance to Panama, including any assistance appropriated and previously obligated, "unless" the President made certain certifications regarding political and human rights conditions within Panama. (The suspension of such assistance made public by Secretary of State Shultz on August 6, 1987,⁶ had been effected through administrative measures taken by the executive branch.)

Section 570 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act⁷ provides:

ASSISTANCE FOR PANAMA

SEC. 570. (a) Unless the President certifies to Congress that—

(1) the Government of Panama has demonstrated substantial progress in assuring civilian control of the armed forces and that

⁵ 53 Fed. Reg. 12,134-35 (1988).

⁶ See p. 567 *supra*.

⁷ Pub. L. No. 100-202, §101(e), 101 Stat. 1329-131 (1987).

the Panama Defense Forces and its leaders have been removed from non-military activities and institutions;

(2) the Government of Panama is conducting an impartial investigation into allegations of illegal actions by members of the Panama Defense Forces;

(3) a satisfactory agreement has been reached between the governing authorities and representatives of the opposition forces on conditions for free and fair elections; and

(4) freedom of the press and other constitutional guarantees, including due process of law, are restored to the Panamanian people;

then no United States assistance (including any such assistance appropriated and previously obligated) shall be obligated or expended for Panama in this fiscal year and any fiscal year thereafter, and none of the funds appropriated or otherwise made available in this Act, or any other Act, shall be used to finance any participation of the United States in joint military exercises conducted in Panama during the period January 1, 1988, through December 31, 1988.

(b) It is the sense of the Congress that if the conditions described in paragraphs (1) through (4) of subsection (a) have been certified as having been met, then not only will United States assistance be restored, but increased levels of such assistance should be considered for Panama.

(c) For purposes of this section, the term "United States assistance" means assistance of any kind which is provided by grant, sale, loan, lease, credit, guaranty, or insurance, or by any other means, by any agency or instrumentality of the United States Government, including—

(1) assistance under the Foreign Assistance Act of 1961 (including programs under title IV of chapter 2 of part I of such Act);

(2) sales, credits, and guarantees under the Arms Export Control Act;

(3) sales under title I or III and donations under title II of the Agricultural Trade Development and Assistance Act of 1954 of nonfood commodities;

(4) other financing programs of the Commodity Credit Corporation for export sales of nonfood commodities;

(5) financing under the Export-Import Bank Act of 1945; and

(6) assistance provided by the Central Intelligence Agency or assistance provided by any other entity or component of the United States Government if such assistance is carried out in connection with, or for purposes of conducting, intelligence or intelligence-related activities except that this shall not include activities undertaken solely to collect necessary intelligence;

except that the term "United States assistance" does not include (A) assistance under chapter 1 of part I of the Foreign Assistance Act of 1961 insofar as such assistance is provided through private and voluntary organizations or other nongovernmental agencies, (B) assistance which involves the donations of food or medicine, (C) disaster relief assistance (including any assistance under chapter 9 of part I of the Foreign Assistance Act of 1961), (D) assistance for refugees, (E) assistance under the Inter-American Foundation Act, (F) assistance necessary for the continued financing of education for Panamanians in the

United States, or (G) assistance made available for termination costs arising from the requirements of this section.

(d) The Secretary of Treasury shall instruct the United States Executive Directors to the Multilateral Development Banks (the International Bank for Reconstruction and Development, the International Finance Corporation, and the Inter-American Development Bank) to vote against any loan to Panama, unless the President has certified in advance that the conditions set forth in subsection (a) of this section have been met.⁸

Section 571 of that Act was also specifically directed against political and human rights abuses within Panama. It reads, in part:

ELIMINATION OF THE SUGAR QUOTA ALLOCATION OF PANAMA

SEC. 571. (a) IN GENERAL.—Notwithstanding any other provision of law, no sugars, sirups, or molasses that are products of Panama may be imported into the United States after the date of enactment of this Act during any period for which a limitation is imposed by authorities provided under any other law on the total quantity of sugars, sirups, and molasses that may be imported into the United States: *Provided*, That such products may be imported after the beginning of the last week of any quota year if the President certifies that for the entire duration of the quota year, freedom of the press and other constitutional guarantees, including due process of law, have been restored to the Panamanian people.

(b) REALLOCATION OF QUOTA AMOUNTS.—For any quota year for which the President does not certify for the entire duration of the quota year, freedom of the press and all other constitutional guarantees, including due process of law, have been restored to the Panamanian people, no later than the last week of such quota year, the United States Trade Representative shall reallocate among other foreign countries the quantity of sugar, sirup, and molasses products of Panama that could have been imported into the United States before the date of enactment of this Act under any limitation imposed by other law on the total quantity of sugars, sirups, and molasses that may be imported into the United States during any period.

(d) CERTIFICATION.—The provisions of subsections (a) and (b), and the amendments made by subsection (c) of this section, shall cease to apply if the President certifies to Congress pursuant to section 570(a) of this Act.⁹

On April 29, 1988, President Reagan decided to exempt certain types of payments¹⁰ by United States persons in Panama from the economic sanc-

⁸ Reprinted in 1 HOUSE COMM. ON FOREIGN AFFAIRS AND SENATE COMM. ON FOREIGN RELATIONS, 101ST CONG., 2D SESS., LEGISLATION ON FOREIGN RELATIONS THROUGH 1987, at 546-47 (Jt. Comm. Print 1988).

⁹ *Id.* at 547-48.

¹⁰ These included payments by individuals other than income tax payments (individuals who make their own social security payments may continue to do so); travel-related payments by individuals, including departure fees and ticket taxes, or by U.S. firms in connection with the provision of travel services to individuals, e.g., landing fees and fuel; payments for postal

tions against Panama effected by Executive Order No. 12,635. Payments other than those specified in Treasury regulations must be made to the specially designated account at the Federal Reserve Bank of New York in accordance with Treasury guidelines to be issued. Payments that must be paid into the specially designated account include corporate and individual income taxes, social security taxes (when paid by corporations or agencies of the U.S. Government but not by individuals who ordinarily pay such taxes directly), direct taxes and fees (e.g., port fees, export fees, import duties and related expenses), direct payments of excise taxes collected as agent for the Government of Panama and rental fees. Additionally, individuals may not make payments, directly or indirectly, for or on behalf of U.S. firms.¹¹

ENVIRONMENTAL AFFAIRS

(U.S. *Digest*, Ch. 11, §1)

Whaling—Japanese Violation of IWC Moratorium

In accordance with section 201(e) of the Magnuson Fishery Conservation and Management Act of 1976, as amended (the Packwood-Magnuson Amendment, 16 U.S.C. §1821(e) (1982)) and section 8 of the Fishermen's Protective Act of 1967, as amended (the Pelly Amendment, 22 U.S.C. §1978), Secretary of Commerce C. William Verity certified to President Reagan on February 9, 1988, that nationals of Japan were conducting whaling operations that diminish the effectiveness of the International Whaling Commission's conservation program.

Secretary Verity's certification was based upon the fact that the Government of Japan had issued special permits for scientific research to its nationals, which allows them to kill Southern Hemisphere minke whales for that purpose, notwithstanding the adoption by the International Whaling Commission (IWC) of resolutions regarding such permits at its annual meeting in June 1987.¹ The Secretary's certification discussed the Commission's actions on this issue, in part as follows:

In a general resolution (IWC/39/24), the IWC requested its Scientific Committee to review all such programs and to report whether the programs satisfy certain scientific criteria. In that resolution, the IWC also recommended that member governments not issue permits for programs that, in the view of the IWC, do not satisfy the criteria "and therefore are not consistent with the Commission's conservation policy."

services and for telephone, telegraph and other telecommunication services; payments for utilities including electricity, water and similar municipal services; payments of indirect taxes (i.e., those normally collected in the purchase of goods and services such as sales and excise taxes) and certain administrative fees paid in connection with basic business activity (Treasury regulations to be issued will specify which administrative fees can be paid).

¹¹ Dept. of the Treasury news release, Apr. 30, 1988, Dept. of State File No. P88 0063-0941. For the Panamanian Transaction Regulations, see 53 Fed. Reg. 20,565 (1988).

¹ Res. IWC/39/24 and IWC/39/45, INTERNATIONAL WHALING COMMISSION, CHAIRMAN'S REPORT OF THE 39TH MEETING, 22-26 JUNE 1987, Apps. 1 and 4 (1987).

In a resolution concerning Japan's proposed research program (IWC/39/45), the IWC (1) adopted the view that Japan's program does not satisfy the applicable criteria; and (2) recommended that Japan not issue the special permit for the program until the serious uncertainties in the program identified by the IWC Scientific Committee have been resolved to the satisfaction of that Committee. In December 1987, the IWC Scientific Committee held a special meeting to review a revised research program submitted by Japan in the interim. The report of the Scientific Committee reveals that Japan did not succeed in satisfying the Committee that the defects in its program had been cured. On December 22, 1987, the IWC circulated a resolution for a postal vote due February 14, 1988, recommending that Japan not take whales under its revised scientific research program. Nevertheless, the Government of Japan proceeded to issue the permit and, pursuant to that permit, nationals of Japan have begun killing Southern Hemisphere minke whales. Under these circumstances, I have determined, and hereby certify, that nationals of Japan are conducting whaling operations that diminish the effectiveness of the IWC conservation program.²

In identical letters to the Speaker of the House of Representatives (Congressman James C. Wright, Jr.) and the President of the Senate (Vice President George H. W. Bush) dated April 6, 1988, the President reported in accordance with the Pelly Amendment on his action regarding the certification, as well as on the reasons for his decision not to prohibit—in accordance with his discretionary authority under the Pelly Amendment—the import of all Japanese fish products into the United States. The President's letter read in part:

Shortly after the Secretary's certification, the IWC adopted a second resolution on February 14, 1988, recommending that Japan not proceed with its revised research program. Japan has continued its whaling activities notwithstanding this second resolution.

Given the lack of any evidence that Japan is bringing its whaling activities into conformance with the recommendations of the IWC, I am directing the Secretary of State under the Packwood-Magnuson Amendment to withhold 100 percent of the fishing privileges that would otherwise be available to Japan in the U.S. Exclusive Economic Zone. Japan has requested the opportunity to fish for 3,000 metric tons of sea snails and 5,000 metric tons of Pacific whiting. These requests will be denied. In addition, Japan will be barred from any future allocations of fishing privileges for any other species, including Pacific cod, until the Secretary of Commerce determines that the situation has been corrected.

The sanctions being imposed are the strongest possible under the Packwood-Magnuson Amendment. The immediate and prospective effects of a 100 percent reduction of fishing allocations, coupled with

² Dept. of State, Exec. Secretariat Log No. 8804258, attachment *See also U.S. Whaling Policy*, DEPT. OF STATE, GIST, October 1987.

On the postal vote, see IWC Circular Communications, Dec. 22, 1987, and Feb. 15, 1988, IWC Refs. RG/VJH/16800 and RG/VJH/16891, respectively.

Presidential review in the near future, is the most effective means of encouraging Japan to embrace the IWC conservation program. Therefore, I will not impose at this time the sanctions available under the Pelly Amendment against Japanese fish products imported into the United States. I am asking Secretary Verity, in cooperation with Secretary Shultz, to monitor Japanese whaling practices during the next few months and to report to me no later than December 1, 1988.

I also am directing the Secretary of Commerce and the Secretary of State to continue consultations with our IWC partners to ensure that we bring to a halt all whaling that diminishes the effectiveness of the IWC's conservation program, specifically including that under Japan's contested research program. Our actions taken today and in the future should encourage all nations to adhere to the conservation programs of the IWC.³

In *Japan Whaling Association v. American Cetacean Society*,⁴ the Supreme Court, reversing on certiorari both the Court of Appeals for the District of Columbia Circuit and the District Court for the District of Columbia, held by five to four that the Secretary of Commerce was not mandatorily required to certify Japan under the Packwood-Magnuson or Pelly Amendments, where Japan had agreed with the United States (in 1984)⁵ to cease commercial whaling altogether by 1988, in return for the "short-term continuance of a specified level of limited whaling by Japan." The Court ruled that the construction placed on the statutes by the Secretary of Commerce—that there were circumstances in which he might withhold certification, despite a country's departures from the IWC schedules (quotas), without violating his duty—was "also" a reasonable construction of the language used in both the Packwood-Magnuson and the Pelly Amendments. The Court concluded that this construction "neither contradicted the language of either Amendment, nor frustrated congressional intent."⁶

³ 24 WEEKLY COMP. PRES. DOC. 438 (Apr. 11, 1988).

⁴ 106 S.Ct. 2860 (1986), *rev'g* *American Cetacean Soc'y v. Baldrige*, 604 F.Supp. 1398 (D.D.C.), 604 F.Supp. 1411 (D.D.C.), 768 F.2d 426 (D.C. Cir. 1985).

⁵ See 79 AJIL 434 (1985).

⁶ 106 S.Ct. at 2871.

JUDICIAL DECISIONS

MONROE LEIGH

Political asylum—deportation—standard of judicial review—motion to reopen proceedings

IMMIGRATION AND NATURALIZATION SERVICE v. ABUDU. 108 S.Ct. 904. U.S. Supreme Court, March 1, 1988.

The Immigration and Naturalization Service (INS) petitioned the Supreme Court to review a court of appeals decision (1) reversing the order of the Board of Immigration Appeals (BIA) denying respondent's motion to reopen deportation proceedings, and (2) remanding for an evidentiary hearing on respondent's asylum and withholding of deportation claims. This case arose in 1981 when the INS initiated deportation proceedings against respondent, Assibi Abudu, a native and citizen of Ghana who had overstayed a student visa and had pleaded guilty to drug charges. During the deportation proceedings, respondent expressly declined to seek asylum as a refugee.¹ The immigration judge ordered the respondent deported on July 1, 1982, and the BIA dismissed his appeal on August 14, 1984. The respondent filed a petition for review of the deportation order in the U.S. Court of Appeals for the Ninth Circuit and a motion with the BIA requesting a reopening of his deportation proceeding to enable him to apply for asylum and withholding of deportation. The BIA denied respondent's motion to reopen and the respondent then appealed to the Ninth Circuit. The appellate court consolidated the respondent's petitions for review and affirmed the deportation order, but reversed the order denying the motion to reopen the deportation proceeding and remanded for further evidentiary hearings. The U.S. Supreme Court (per Stevens, J.) unanimously reversed the appellate court's order and *held*: that the court below had erred in subjecting the BIA decision to a standard of review stricter than the appropriate abuse-of-discretion standard.

In its review of the decision below, the Court initially clarified the question presented. The regulations issued by the INS to implement the Immigration and Nationality Act (the Act) provide that the party filing a motion to reopen deportation proceedings must demonstrate to the BIA "that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing."² If the

¹ Instead, respondent argued that his marriage to a U.S. citizen made him eligible for adjustment of status under 8 U.S.C. §1255(a). The immigration judge denied the application for adjustment of status because respondent's drug conviction constituted a nonwaivable ground of excludability (see 8 U.S.C. §1182(a)(23) (1982)), and the BIA affirmed this determination.

² 8 C.F.R. §3.2 (1988).

motion to reopen includes a request for asylum, the proof of new evidence must include a "reasonable" explanation by the alien of "the failure to request asylum prior to the completion of the . . . deportation proceeding."³ Further, the movant must establish *prima facie* eligibility for asylum under section 208 or withholding of deportation under section 243(h) of the Act.

While the BIA based its denial of respondent's motion to reopen on both new evidence/reasonable explanation and *prima facie* grounds, either of which would have sufficed according to the Court,⁴ the appellate court apparently blended the two grounds into one.⁵ The questions presented in the petition for certiorari also did not clearly separate the BIA's two grounds for denial, but the Court relied on the formulation of the question in the petitioner's reply memorandum to clarify the narrow issue before the Court: "to determine the standard a Court of Appeals must apply when reviewing the BIA's conclusion that an alien has not reasonably explained his failure to assert his asylum claim at the outset."⁶ The Court declined to consider the standard of review for a BIA denial of a motion to reopen based on the ground that the movant had not established a *prima facie* case for relief.

With respect to the standard of review of the BIA's decision, the Court held that the appellate court had erroneously analogized the respondent's motion to reopen to a motion for summary judgment. In its opinion, the appellate court stated that a motion to reopen deportation proceedings may be granted if it "presents 'proof that will support the desired finding [of a *prima facie* case] . . . until it is contradicted or overruled by other evidence.'" ⁷ As is the case in the review of motions for summary judgment, the appellate court stated that "inferences are to be drawn in favor of the party whose entitlement to further proceedings is at stake: . . . the alien seeking reopening under 8 C.F.R. 3.2."⁸

The Court criticized the appellate court's comparison of the motion to reopen to a motion for summary judgment as unsupported by precedent and contrary to decisions reached by other courts of appeals and by other panels in the Ninth Circuit. Precedent has established the proposition that "the BIA has discretion to deny a motion to reopen even if the alien has made out a *prima facie* case for relief."⁹ The Court suggested that these "prior glosses on §3.2 have served as support for an abuse-of-discretion standard of review for the [cases in which] the BIA simply refuses to grant relief that is itself discretionary in nature, even if the alien has surmounted

³ *Id.* §208.11.

⁴ 108 S.Ct. 904, 908.

⁵ The appellate court "did not discuss, as a separate matter, the 'failure to explain' ground in the BIA's decision," and also stated in its opinion that "the sole issue [in this case] is whether petitioner presented a *prima facie* case for reopening." *Id.* at 910 (quoting *Abudu v. INS*, 802 F.2d 1096, 1100 (9th Cir. 1986) (case below)).

⁶ *Id.* at 911.

⁷ *Abudu*, 802 F.2d at 1101 (quoting *Maroufi v. INS*, 772 F.2d 597, 599 (9th Cir. 1985)).

⁸ *Id.*

⁹ 108 S.Ct. at 912 (citing *INS v. Jong Ha Wang*, 450 U.S. 139, 144 n.5 (1981); *INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985); *INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984)).

the requisite thresholds of prima facie case and new evidence/reasonable explanation."¹⁰ Since the new evidence/reasonable explanation evidentiary requirements of sections 3.2 and 208.11 must be satisfied by the alien before the BIA reaches the ultimate decision on discretionary relief from deportation, the Court reasoned that the BIA's decisions regarding the evidentiary requirements are also subject to an abuse-of-discretion standard of review.¹¹

To support its legal analysis, the Court suggested that a motion to reopen deportation proceedings should be analogized to a petition for rehearing or a motion for a new trial on the basis of newly discovered evidence. In these cases, although granting the petition or motion is generally disfavored, the public interest in judicial efficiency must be balanced with the interest in giving the parties a fair opportunity to develop and present their cases. The Court has applied this principle to motions to reopen deportation proceedings in the past, quoting with approval a dissenting opinion in a case before the Ninth Circuit that stated that the INS "has some latitude in deciding when to reopen a case" and that the INS "should have the right to be restrictive" to prevent the "endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case."¹²

The Court extended its analogy by demonstrating that the application of the stricter standard of review of motions for summary judgment to motions to reopen has been rejected by precedent and by the "tenor" of the INS regulations, which "plainly" disfavor motions to reopen.¹³ Therefore, for the purpose of a motion to reopen deportation proceedings, the alien bears the same heavy burden of proof as the moving party in a motion for a new trial in a criminal case. In addition, the Court indicated that it would grant extra latitude (i.e., more deference) to INS decisions, which, unlike other adjudications by administrative agencies, often implicate questions of foreign relations.¹⁴ For all the foregoing reasons, the Court concluded that the BIA did not abuse its discretion when it held that the respondent had not reasonably explained his failure to apply for asylum prior to the completion of his initial deportation proceeding.

The Court's decision to apply the abuse-of-discretion standard of review to BIA decisions regarding requests for asylum raised in a motion to reopen deportation proceedings reaffirms the policy on judicial review established by the Administrative Procedure Act, which provides that decisions rendered by executive agencies must be upheld unless they represent an abuse of discretion.¹⁵ The decision does not establish a new principle regarding

¹⁰ *Id.*

¹¹ *Id.* at 912-13.

¹² *Jong Ha Wang*, 450 U.S. at 144 n.5 (quoting Judge Wallace's dissenting opinion in *Villena v. INS*, 622 F.2d 1352, 1362 (9th Cir. 1980) (en banc)).

¹³ 108 S.Ct. at 914. The INS regulations regarding motions to reopen deportation proceedings establish the procedure in the negative, i.e., "Motions to reopen in deportation proceedings shall not be granted unless . . ." 8 C.F.R. §3.2 (emphasis added). See also *id.* §242.22.

¹⁴ 108 S.Ct. at 914-15.

¹⁵ 5 U.S.C. §706 (1982).

review of INS decisions but, rather, clarifies that the abuse-of-discretion standard of review applies to all aspects of adjudications regarding postdeportation proceedings.

Sovereign immunity—federal jurisdiction—whether alleged tortious conduct abroad causes a direct effect in the United States

MARTIN v. REPUBLIC OF SOUTH AFRICA. 836 F.2d 91.
U.S. Court of Appeals, 2d Cir., December 29, 1987.

Appellant sued the Republic of South Africa and two South African Government-owned hospitals in the U.S. District Court for the Southern District of New York for negligence and medical malpractice. Appellant, who is a black American citizen, alleged that the defendants had caused his permanent disability by delaying medical treatment to him because of his color following an automobile accident in South Africa. Appellant alleged that, because of this delayed medical treatment, he had returned to the United States permanently disabled, subject to continuing medical complications and dependent on government aid for his subsistence. The district court dismissed the complaint on the grounds that it lacked subject matter jurisdiction and personal jurisdiction over the defendants. It held that the defendants were entitled to sovereign immunity under the Foreign Sovereign Immunities Act (28 U.S.C. §§1330, 1602–1611 (1982)) (the Act) since their conduct did not cause a “direct effect in the United States” within the meaning of section 1605(a)(2) of the Act.¹ The U.S. Court of Appeals for the Second Circuit (per Timbers, J.) affirmed and *held*: that South Africa’s acts did not have a “direct effect in the United States” for the purposes of the Act.

In interpreting the phrase “direct effect in the United States,” the court found the legislative history unhelpful. The House report indicated that a “direct effect” in the United States would be such as would subject the defendant’s action to U.S. jurisdiction in accordance with section 18 of the *Restatement (Second) of Foreign Relations Law of the United States* (1965).² This, the court concluded, was “inapposite”³ since, as the Court of Appeals for the Fifth Circuit had noted in *Zernicek v. Brown & Root, Inc.*,⁴ section 18 appeared to relate not to sovereign immunity but to the extent to which a state may enact substantive rules of law governing conduct outside its terri-

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(2) in which an action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. §1605(a)(2) (1982).

² See H.R. REP. NO. 1487, 94th Cong., 2d Sess. 6 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6618.

³ 836 F.2d 91, 94.

⁴ 826 F.2d 415, 417 (5th Cir. 1987).

tory that has effects within its territory. For this reason, the Second Circuit had held in *Texas Trading & Milling Corp v. Federal Republic of Nigeria* that, in construing the "direct effect" clause, the courts should not be constrained to follow the "substantial" and "foreseeable" factors of section 18 of the *Restatement (Second)*.⁵

The court therefore based its holding on the language of the statute, and subsequent case law, in particular the *Texas Trading* case. That case had concerned a contract for three American companies to supply cement to Nigeria. Payment was to be made through a New York bank. Nigeria repudiated the contract, and the companies sued Nigeria in the United States. The Second Circuit held that the district court had subject matter jurisdiction. The effect of the breach was "direct," as "financial loss" had been sustained. It was "in the United States" because the plaintiffs were to have presented documents and collected money in the United States but were precluded from doing so by Nigeria's breach of contract. No injury was sustained until the plaintiffs were denied payment, in the United States, from the New York bank.

In the present case, however, the "effects" of South Africa's acts occurred in South Africa, where the appellant became quadriplegic. Appellant was not in the United States at the time of the accident and, indeed, did not return to the United States until more than a year after the date of the accident. *Texas Trading* was therefore distinguishable.⁶ The court found the present facts to be similar to those in *Zernicek*, in which the Fifth Circuit held that continuing sickness caused by exposure to radiation overseas was not a "direct" effect within the meaning of the Act.⁷ The Second Circuit had also noted that all courts that have considered a claim for personal injuries sustained in a foreign state have dismissed the claim because they presented insufficiently direct effects.⁸

The court rejected appellant's contention that this holding created a distinction between corporations and individuals. The "plain language" of the Act led the court to conclude that South Africa's conduct did not cause a direct effect in the United States.⁹

In terms of the statutory language, the court's holding seems to be logical: an injury to a natural person outside U.S. jurisdiction does occur abroad, not "in" the United States. Even if the person is a U.S. citizen who returns to the United States and requires lifetime care, the continuing effects are

⁵ 647 F.2d 300, 311 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

⁶ The *Texas Trading* court had noted that in cases involving personal injury abroad, it was easy to locate the 'effect' outside the United States." 647 F.2d at 312 n.35.

⁷ 826 F.2d at 419.

⁸ See *Tucker v. Whitaker Travel, Ltd.*, 620 F.Supp. 578, 586 (E.D. Pa. 1985), *aff'd*, 800 F.2d 140 (3d Cir.), *cert. denied*, 107 S.Ct. 578 (1986) ("Whatever pain and pecuniary loss plaintiffs suffer in the United States are indirect consequences of the accident [overseas]"); and *Upton v. Empire of Iran*, 459 F.Supp. 264, 266 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979) ("The common sense interpretation of a 'direct effect' is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption").

⁹ 836 F.2d at 95.

"indirect" rather than "direct." This decision, as well as the Fifth Circuit's decision in *Zernicek* and several lower court rulings, should serve to establish that personal injuries suffered abroad may not be pursued under the Foreign Sovereign Immunities Act. Although the court stated that no distinction exists in the relevant law between individuals and corporations, it remains possible that failure to pay an American corporation overseas can create an effect "in the United States" for purposes of the Act.¹⁰

Viewed in relation to the body of case law created in recent years by the Second Circuit, the court's decision in this case reflects a trend different from that found in the Second Circuit's decisions under the Alien Tort Claims Act. The Second Circuit has held that under the Alien Tort Claims Act aliens can pursue claims for torture against other aliens based on injuries incurred abroad.¹¹ In a recent decision involving *Amerada Hess*, the Second Circuit has also held that foreign corporations may pursue claims against foreign sovereigns under the Alien Tort Claims Act for injuries suffered abroad on the high seas without regard to the Foreign Sovereign Immunities Act.¹² If the *Amerada Hess* decision, now pending before the Supreme Court, is upheld, aliens—but not U.S. citizens—would be able to pursue claims against foreign sovereigns in U.S. courts for personal injuries occurring outside the United States.

Foreign Sovereign Immunities Act—act of state doctrine—treaty exception

DAYTON v. CZECHOSLOVAK SOCIALIST REPUBLIC. 834 F.2d 203.
U.S. Court of Appeals, D.C. Cir., December 8, 1987.

Appellants, former Czechoslovakian citizens who became United States citizens after their property was expropriated, filed a lawsuit against Czechoslovakia and a Czechoslovakian trading company (Centrotex) seeking compensation for the nationalization of their textile production plants in Czechoslovakia in October 1945. Plaintiffs received partial payment under a claims settlement agreement but sought full recovery through this lawsuit. The district court denied plaintiffs' motions for entry of default judgment against Czechoslovakia and dismissed the complaint. The U.S. Court of Appeals for the District of Columbia Circuit (per Ginsburg, J.) affirmed the district court's judgment and *held*: that defendants were immune from suit under the provisions of the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330, 1602–1611 (1982)) (FSIA).

The court first determined that appellees, the Czechoslovak Socialist Republic and Centrotex, were entitled to immunity unless one of the statutory

¹⁰ This point was expressly left open in *Texas Trading*, as was the case of failure to pay a foreign corporation in the United States. 647 F.2d at 312 & nn. 34 & 35.

¹¹ *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980), *summarized in* 75 AJIL 149 (1981).

¹² *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987), *summarized in* 82 AJIL 126 (1988), *cert. granted*, 56 U.S.L.W. 3718 (U.S. Apr. 18, 1988) (No. 87-1372).

exceptions to immunity was applicable. Adopting the district court's reasoning, the court rejected appellant's theory that the Government of Czechoslovakia had waived the sovereign immunity of Centrotex when it provided the company with the capacity to sue and be sued. On this issue the district court had referred to Congress's intention "to extend sovereign immunity to all foreign state instrumentalities endowed with the capacity to sue and be sued when it enacted the FSIA," as well as to "the legislative history to §1603 [which] establishes that entities with the capacity 'to sue and be sued' were included within the protection of §1604."¹ Therefore, the court of appeals agreed that "no intelligent waiver" can be "fairly extracted from endowment of a state trading company with the capacity to sue and be sued."²

The court also found that the expropriated property exception in section 1605(a)(3) did not apply. Neither the expropriated textile plants, nor any properties exchanged for these plants, were present in the United States, nor did appellee Centrotex own or operate such properties.³

Even though the court rejected the claim on the basis of the FSIA, the court also noted that the "act of state doctrine" would preclude judicial review in any event. Under that doctrine, in the "absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory."⁴ The court held that the act of state doctrine applied even though appellee Czechoslovakia had not participated in this lawsuit, because the doctrine "is a judicial policy of restraint, [and its] application . . . cannot be 'waived' by the foreign state."⁵

The court rejected appellants' argument that the treaty exception should apply. Noting that this exception requires "a treaty or other unambiguous agreement," the court considered the 1946 Agreement, in which the parties agreed to "provide adequate and effective compensation to the nationals of one country with respect to their rights or interests in properties which may have been or may be nationalized or requisitioned by the Government of the other country."⁶ Since the Agreement refers only to nationals and "contains no reference to *when the property owners became [United States] nationals for the purpose of being included in settlement coverage,*"⁷ it was unclear whether the Agreement applied to appellants. This lack of clarity caused the court to conclude that the Agreement was insufficient "to dislodge the act of state doctrine."⁸

¹ 672 F.Supp. 7, 9-11 (D.D.C. 1986).

² 834 F.2d 203, 205.

³ *Id.* at 206.

⁴ *Id.* (quoting RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §469 (Tent. Draft No. 7, 1986)).

⁵ *Id.* (quoting RESTATEMENT (REVISED), *supra* note 4, §469 comment e).

⁶ Agreement Relating to Commercial Policy, Nov. 14, 1946, United States-Czechoslovakia, 51 Stat. 2431, TIAS No. 1569, 7 UNTS 119.

⁷ 834 F.2d at 206 (quoting Plaintiffs' Memorandum in Opposition to the Motion to Dismiss the Complaints at 21-22) (emphasis in original).

⁸ *Id.*

This case confirms that U.S. private claimants face substantial legal obstacles in U.S. courts when seeking compensation for foreign expropriations. Private claimants may turn instead to the U.S. Government to espouse their claims or to Congress for legislation vesting blocked assets.

Bankruptcy—act of state doctrine—misappropriation of trade secrets—international comity—constructive trust

REMINGTON RAND CORP. v. BUSINESS SYSTEMS, INC. 830 F.2d 1260.
U.S. Court of Appeals, 3d Cir., October 5, 1987.

Appellee, Remington Rand Corp., filed an adversary action in U.S. bankruptcy court alleging that appellant, Business Systems, Inc., B.V., had misappropriated its trade secrets in a certain typewriter. In 1978 appellee had acquired the know-how to produce the SR-101 electronic typewriter, which it then licensed to its Dutch subsidiary. In 1981 appellee sought reorganization under chapter 11 of the United States Bankruptcy Code. At the same time, the Dutch subsidiary entered "suspension of payments"—the equivalent of reorganization under Dutch law. While appellee was successfully reorganized, its subsidiary was declared bankrupt. The Dutch trustees in bankruptcy sold the subsidiary's manufacturing plant, together with the know-how to produce the SR-101, to appellant. The bankruptcy court held appellant and its U.S. affiliate liable for misappropriating the know-how to produce the SR-101 and made recommendations to the district court on appropriate relief. The district court ordered appellant to return the misappropriated documents and imposed a constructive trust on all products and proceeds derived therefrom no matter where those products were located, to secure any damages ultimately awarded to appellee. The district court later awarded over \$200 million to appellee. On appeal, the United States Court of Appeals for the Third Circuit (per Aldisert, J.) affirmed in part and reversed in part and *held*: (1) that the district court's finding of liability on misappropriation accorded with Dutch law and was not in error; (2) that neither the act of state doctrine nor international comity precluded the district court from entertaining appellee's suit; (3) that requiring the return of the know-how documents to appellee was an appropriate remedial measure; (4) that international comity required vacating the constructive trust imposed on appellant's non-U.S. assets; and (5) that the district court's assessment of damages should be vacated and remanded for further proceedings in accordance with the opinion.

The Third Circuit first addressed on appeal whether the district court's ruling on misappropriation was proper. The district court had concluded that under Dutch law, appellants' liability depended upon two elements: "(1) some inappropriate act by [the] Dutch trustees, and (2) some inappropriate act by or imputed to [appellant]." ¹ The court of appeals concluded, as had the district court, that judging the appropriateness of the Dutch trustees' actions required recourse to Dutch law. After reviewing a number

¹ 830 F.2d 1260, 1263.

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of legal sources, the Third Circuit concluded that misappropriation of trade secrets constituted a tort under Dutch law, and that the trustees in bankruptcy had therefore committed an inappropriate act by transferring the know-how to produce the SR-101 without compensating appellee.² As to the second element of liability, the district court had adopted the bankruptcy court's determination that under both New Jersey and Dutch law, the conduct of appellant was inappropriate since it had known or should have known of the know-how-licensing agreement when it purchased the assets of appellee's subsidiary from the Dutch trustees in bankruptcy. The court of appeals concluded that this finding was not clearly erroneous. Both elements of liability having been met, the Third Circuit held that the district court had not erred in ruling appellant liable to appellee for misappropriation of trade secrets.

The court of appeals next focused on appellant's argument that the act of state doctrine precluded appellee's suit. The court observed that acts of bankruptcy trustees were not "'considered policy determination[s] by a government to give effect to its political and public interests,'" and thus did not "rise to the dignity of acts of a foreign sovereign" requiring deference under the act of state doctrine. The application of that doctrine had therefore been properly rejected by the district court.

Appellant argued alternatively that since a Dutch court had approved the trustees' sale of the know-how, the doctrine of international comity barred any examination of the propriety of that transaction. The bankruptcy court had rejected that argument on the basis of its findings that the purchase agreement between appellant and the trustees exceeded the Dutch court's order, and that the Dutch court neither knew of, nor participated in, the negotiation of the purchase agreement. On appeal, appellant alleged that the bankruptcy court's failure to consider the SR-101 know-how as an asset authorized to be sold was an improper interpretation of the Dutch court's order. The court of appeals concluded that appellant had failed to establish that the bankruptcy court's findings were clearly erroneous, and thus held that the courts below had not abused their discretion in refusing to abstain from hearing appellee's claims on the grounds of comity.⁵

Appellant also argued on appeal that the district court's equitable relief order was inconsistent with principles of comity since at the time of the order, appellant was in bankruptcy proceedings in the Netherlands. With respect to the district court's order that appellant turn over to appellee the

² Specifically, the court found that the trustees' actions violated the Netherlands Civil Code, article 1401, which, according to the Dutch Supreme Court, proscribes any act that "conflicts with . . . the duty of good care to be observed in social intercourse with regard to another's person or goods." *Id.* at 1264 (quoting *Lindenbaum v. Cohen*, 1919 NJ 161 (HR)).

³ *Id.* at 1265 (citing *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294 (3d Cir. 1979)).

⁴ *Id.*

⁵ The court of appeals alternatively held that the bankruptcy and district courts had not erred in denying comity to the Dutch court order since appellant did not have notice of, or an opportunity to be heard at, the Dutch proceedings, and was thus denied due process.

misappropriated trade-secret documents, the court of appeals, like the court below, rejected appellant's argument. According to the court, compliance with the order did not offend principles of comity since the question of ownership of the documents had been fully litigated in district court, and there had been no contrary court ruling in the Netherlands.⁶ Much more problematic for the court of appeals, however, was the constructive trust placed on all typewriters, parts and proceeds of appellant—"the most controversial aspect of the district court's . . . order."⁷

At the outset, the Third Circuit stressed the tension in the case that resulted from appellant's having entered "suspension of payments" status in the Netherlands after the commencement of the litigation in the United States. From appellant's standpoint, the court noted, the constructive trust unfairly granted appellee priority over similarly situated creditors in the Netherlands. Indeed, for this very reason, the appellant's Dutch trustee had refused to obey the district court's order and had concluded that the constructive trust order did not affect the rights of Dutch banks under their security agreements with appellant. From appellee's perspective, on the other hand, the constructive trust represented the only realistic means of recovering on its judgment against appellant. Resolving these opposing considerations, the court noted, required resort to "general precepts of transnational business affairs, especially those that apply to commercial reorganizations or bankruptcies."⁸

Supporting the extension of comity to the bankruptcy proceedings in the Netherlands, according to the court of appeals, was American bankruptcy law's fundamental principle—shared by Dutch law—that assets be distributed equally among creditors of similar standing.⁹ Moreover, the court observed, the U.S. Bankruptcy Code¹⁰ expressly recognizes an American policy of favoring comity for foreign bankruptcy proceedings. A consideration undercutting the extension of comity, however, was the obligation of the district court to prevent " 'forcing American creditors to participate in foreign proceedings in which their claims will be treated in some manner inimical to this country's policy of equality.' "¹¹

Applying these principles to the facts before it, the court concluded that that portion of the constructive trust order attaching appellant's assets in the United States should be upheld since it raised no comity concerns. To the extent the court's order imposed a constructive trust operating directly on appellant's property outside the United States, however, it "ha[d] the capacity to disregard the underlying reasons for comity, to interfere with the orderly administration of bankruptcy in The Netherlands, and to provoke a confrontation between the courts of the two countries."¹² As a conse-

⁶ 830 F.2d at 1269.

⁷ *Id.* at 1270.

⁸ *Id.* at 1271.

⁹ *Id.*

¹⁰ 11 U.S.C. §304 (1982).

¹¹ 830 F.2d at 1271 (quoting *Banque de Financement v. First Nat'l Bank of Boston*, 568 F.2d 911, 921 (2d Cir. 1977)).

¹² *Id.* at 1272.

quence, the Third Circuit ruled, the order attaching foreign assets could be sustained only as a last resort.

According to the court of appeals, the proper procedure in these circumstances was as follows.¹³ First, after retrial of the damages proceedings,¹⁴ appellee should reduce any damages award it receives to judgment, and then seek a declaratory judgment from the Dutch bankruptcy court as to whether the American judgment will stand on equal terms in appellant's bankruptcy proceedings with a judgment obtained in the Netherlands. If the Dutch court accords full force and effect to the American judgment, the district court will then have to determine whether any of appellant's assets attached in the United States should be forwarded to the Netherlands for distribution. If, however, the Dutch court fails either to rule on appellee's declaratory judgment in a timely fashion, or to accord the district court's judgment appropriate respect, the district court will be free to enter appropriate remedies—including, presumably, the reimposition of that portion of the constructive trust attaching appellant's foreign assets. According to the court of appeals, its solution "would afford appropriate protection to an American creditor, yet also acknowledge the primary role of the Dutch court in equitably distributing the available funds."¹⁵

Indeed, the stepwise solution of the court of appeals to "this vexing problem of private international law" strikes an appropriate balance between protecting the interests of those seeking recourse to U.S. laws and giving due deference to the judicial proceedings of another nation—precisely the considerations that must be taken into account when applying the doctrine of international comity. Whether comity will ultimately be extended in this case, however, depends in the first instance on whether the Dutch bankruptcy court will recognize appellee on the same footing as

¹³ This procedure was first described in the early English case of *Solomons v. Ross*, "[k]nown from a scant note in 1 H. Bl. 131 n., 126 Eng. Rep. 79 n. (1764), more fully reported in a note to *Neale v. Cottingham* (Irish Ch. 1770), reported in Wallis-Lyne, *Irish Chancery Reports* 54, 59 n. (1839)." 830 F.2d at 1273 n.5. In *Solomons v. Ross*, a Dutch trustee in bankruptcy laid claim to assets of an insolvent Dutch debtor that had been attached in London by an English creditor. The English court relinquished the assets to the Dutch trustee after receiving assurances that foreign and domestic creditors would be treated on equal terms under Dutch bankruptcy law.

¹⁴ At the first trial on damages, appellant argued that it could have recreated the know-how to produce the SR-101 from scratch in just 6 months, and that its tort liability must therefore be limited to only the "head start" it received by misappropriating the trade secrets. The district court refused to allow appellant to raise this "lead time valuation defense" as a sanction for failing to obey the court's constructive trust order. In view of its determination that the constructive trust was too far-reaching, the court of appeals held that the sanctions formerly imposed against appellant—the imposition of attorneys' fees and the denial of the lead time valuation defense—must be overturned. Accordingly, it ordered that the district court reassess damages, after giving appellant the opportunity to interpose the lead time valuation defense. On remand, however, the district court recently held that because appellant's head start precluded appellee from entering the market, and because "appellee was denied and continues to be denied possession of the know-how documents despite the Orders of this Court," the head start defense was not available to appellant as a matter of law. *Kilbarr Corp. v. Business Sys., Inc.*, 679 F.Supp. 422 (D.N.J. 1988).

¹⁵ 830 F.2d at 1273.

appellant's Dutch creditors. If it does, then the focus will return to the district court, which will have to determine whether comity should be observed by relinquishing appellant's U.S. assets to the Dutch bankruptcy court.

Arbitration—enforcement of international award in U.S. courts—access to U.S. courts by nonrecognized government—federal question jurisdiction—New York Convention

MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN v. GOULD, INC.
No. CV 87-03673-RG.

U.S. District Court, C.D. Cal., January 14, 1988.

Petitioner, the Ministry of Defense of the Islamic Republic of Iran (Iran), brought suit in federal district court against respondents Gould, Inc., Gould Marketing, Inc. and Gould International, Inc. (collectively, Gould), seeking enforcement of an award of \$3,640,247.13 it had obtained in 1984 against respondent Gould Marketing, Inc. from the Iran-United States Claims Tribunal in The Hague. The respondents moved to dismiss, arguing (1) that the unrecognized Government of Iran has no right of access to United States courts, and (2) that there is no legal mechanism for enforcement of Tribunal awards by U.S. courts. District Judge Richard A. Gadbois, Jr., denied the motion to dismiss, *holding* that the express determination of the executive branch that Iran could sue in U.S. courts was dispositive on the access issue, and that while the case did not fall within the court's federal question jurisdiction, the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)¹ confers jurisdiction to enforce awards by the Tribunal.

In late 1981, respondent Gould Marketing's corporate predecessor brought claims at the Tribunal seeking over \$4 million in contract damages and termination costs arising out of the disruption of a contract for the sale of various electronic equipment and services to the Iranian Ministry of Defense.² After briefing and a hearing on the merits, the Tribunal determined that prepayments already made by Iran, together with counterclaims asserted by Iran against Gould Marketing, exceeded the amounts due to Gould Marketing for work performed and costs incurred. The result was a net award in favor of Iran in the amount of \$3,640,247.13.³

¹ Done June 10, 1958, 21 UST 2517, TIAS No. 6997, 330 UNTS 38 (entered into force Dec. 29, 1970).

² See Gould Marketing, Inc. v. Ministry of Defence of the Islamic Republic of Iran, 6 IRAN-U.S. CLAIMS TRIBUNAL REP. 272, 274, 286 (1984 II), summarized in 79 AJIL 148 (1985).

³ 6 IRAN-U.S. CLAIMS TRIBUNAL REP. at 287. This was an extremely unusual result at the Tribunal. Only eight other contested cases at the Tribunal have resulted in awards against a private U.S. party, generally involving nominal awards of \$2,000 to \$15,000 for costs. Besides Gould, only two other American claimants received substantial adverse monetary awards, and both of these involved large advance payments, some portion of which the claimants conceded was payable to Iran. See Harris International Telecommunications, Inc. v. Islamic Republic of Iran, AWD 323-409-1 (Nov. 2, 1987) (Chamber 1) (\$833,949.44 awarded to Iran); FMC Corp. v. Islamic Republic of Iran, AWD 292-353-2 (Feb. 12, 1987) (Chamber 2) (\$8,659,750.50 awarded to Iran).

Gould Marketing refused to pay Iran the amount of the award. Rather than seek to enforce the award directly against Gould Marketing, Iran initially sought redress by means of a claim at the Tribunal against the United States. In that action, known as *Case A/21*, Iran sought an order compelling the United States to satisfy judgments awarded against all American nationals that refuse voluntarily to pay, much as Iran is required, by means of the Security Account established in the Algiers Accords,⁴ to satisfy awards of the Tribunal against Iranian entities. In its decision in *Case A/21*, the Tribunal rejected Iran's claim, relying on the representations of the United States that U.S. courts were available for enforcement of the Tribunal's awards in Iran's favor. The Tribunal stated that it would reconsider the claim if Iran were ultimately denied such access.⁵ Iran thereafter brought the present action in a U.S. court against Gould Marketing and its corporate affiliates for the enforcement of the award.

Gould moved to dismiss the petition on two grounds. First, it argued that the present Government of the Islamic Republic of Iran should be denied access to the courts of the United States because the United States has not recognized that Government as the legitimate representative of the Iranian state. Second, Gould argued that federal district courts lack subject matter jurisdiction over suits to enforce the Tribunal's awards because such suits cannot be considered to be "civil actions arising under . . . the laws . . . of the United States," as required for "federal question" jurisdiction under 28 U.S.C. §1331. In addition, Gould contended that jurisdiction does not arise from the New York Convention since two necessary elements, a signed agreement to arbitrate and the use of the substantive law of the forum state, are absent.⁶

The United States intervened in the case,⁷ filing a statement of interest supporting Iran's claim for enforcement and refuting Gould's defenses. The United States asserted that it was in its interest that the Tribunal's awards be enforceable (1) to fulfill the international obligations set forth by the Tribunal in *Case A/21*; (2) to encourage Iran to continue to meet its obligations under the Algiers Accords, including replenishment of the Security Account; (3) to establish the enforceability of the Tribunal's awards under the New York Convention in case U.S. claimants should have to seek enforcement of awards against Iran in national courts; and (4) to promote generally the recognition and enforcement of duly rendered international awards in

⁴ Paragraph 7 of the Declaration of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, reprinted in 75 AJIL 418, 420, created a Security Account funded with \$1 billion in Iranian assets that had been frozen during the hostages crisis. Awards to successful American claimants are paid out of the Security Account. No specific provision for the payment of awards in favor of Iranian claimants was made in the Accords.

⁵ Islamic Republic of Iran v. United States, DEC 62-A/21-FT, at 11 (May 4, 1987) (Full Tribunal).

⁶ Gould also raised procedural defenses based on the form of the pleadings. No. CV 37-03673-RG, slip op. at 7, reprinted in INT'L ARB. REP., January 1988, at C.

⁷ The U.S. appearance was pursuant to 28 U.S.C. §517, which authorizes the Attorney General to "attend to the interests" of the United States in any pending suit.

commercial cases.⁸ The United States urged the court to accord Iran full access, arguing that the grant or denial to a foreign sovereign of the right of access to the courts of the United States is a matter in the sole discretion of the executive branch, and stating that implicitly by its past conduct and expressly by its present intervention the United States had determined that such access should be accorded to Iran.⁹ It also urged the court to accept Iran's assertion that the court had jurisdiction over suits to enforce awards by the Tribunal on both federal question and New York Convention grounds.

The court's brief order first rejected Gould's access argument.¹⁰ Recognizing that, traditionally, access to the courts has been reserved to nations enjoying recognition by and diplomatic relations with the United States, the court held that the question of access is ultimately in the "exclusive power of the Executive Branch."¹¹ It accepted the Government's statement of interest on the matter as dispositive.

Turning to the issue of its jurisdiction to adjudicate this dispute, the court refused the request of Iran and the United States that it exercise general federal question jurisdiction under 28 U.S.C. §1331. It held that a suit to enforce an award by the Tribunal could be said to arise under the laws of the United States only if the Algiers Accords establishing the Tribunal were considered part of the law of the United States. Since the declaration establishing the Tribunal was implemented as an executive agreement rather than as a formal treaty with the consent of the Senate, it can be considered the law of the United States for jurisdictional purposes only "if it is self-executing and requires nothing further to implement it."¹² Relying on an earlier decision by the Court of Appeals for the Ninth Circuit expressly finding the Algiers Accords not to be self-executing,¹³ the court held Iran's petition to be outside its general federal question jurisdiction.¹⁴

The court, however, found a sufficient source for its jurisdiction under the New York Convention. The court first noted that the implementing legislation provides that actions arising under the Convention "are deemed to arise under the laws of the United States."¹⁵ It then rejected both of Gould's arguments that the Convention is inapplicable. First, it dismissed

⁸ Statement of Interest of the United States, in Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc., Case No. CV 87-03673-RG, at 3-6 (C.D. Cal. filed Sept. 2, 1987).

⁹ The United States recently filed similar statements of interest in two other cases in which American defendants disputed Iran's right to access to U.S. courts. See Statement of Interest of the United States in Organization for Investment, Economic and Technical Assistance of Iran v. Shack & Kimball, Civ. No. 85-0437 (NHJ) (PJA) (D.D.C. filed Mar. 1, 1988); Brief for Amicus Curiae the United States of America in National Petrochemical Co. of Iran v. The M/T Stolt Sheaf, No. 87-9022 (2d Cir. filed Feb. 29, 1988).

¹⁰ The court made no reference to the prior contrary holding of the U.S. District Court for the Southern District of New York. See National Petrochemical Co. of Iran v. The M/T Stolt Sheaf, 671 F.Supp. 1009 (S.D.N.Y. 1987), *appeal docketed*, No. 87-9022 (2d Cir. Dec. 4, 1987).

¹¹ Slip op. at 3 (relying on Pfizer v. Government of India, 434 U.S. 308 (1978)).

¹² *Id.* at 4.

¹³ Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279 (9th Cir. 1985).

¹⁴ Slip op. at 5.

¹⁵ *Id.* at 6 (citing 9 U.S.C. §203 (1982)).

the contention that the Accords are not an "agreement in writing" between the parties establishing the arbitration as required by the Convention. While Gould did not sign that agreement, "[t]he question whether the Executive can bind U.S. persons to such an arrangement as if they were signatories is quite effectively dispatched by the *Dames & Moore* decision."¹⁶ It also rejected the suggestion that to be enforceable under the Convention, an award must have been based on the arbitration law of a contracting state, in this case the Netherlands, rather than on international law. Conceding that the argument had some appeal, it nevertheless decided to resolve the "form and substance tension" in favor of "the overriding judicial interest in effective arbitral proceedings."¹⁷

The district court's rather summary order will likely not long remain the final exposition of the issues raised in this case, as it may soon be superseded by at least two appellate proceedings. The court granted both parties' requests for certification of the jurisdictional questions to the Ninth Circuit Court of Appeals¹⁸ and an appeal of a different case involving the issue of Iran's access to U.S. courts is now pending in the Second Circuit.¹⁹ Nevertheless, as the first opinion in these circumstances by a court that had the benefit of the strongly stated interest of the United States in the case, the decision points up the issues that are likely to be central to all such cases, and joins a series of cases arising from the Iranian hostage crisis that have involved the balance of private interests and the Executive's plenary foreign affairs authority.

Alien Tort Claims Act—jurisdiction—default judgment—misappropriation of public funds by deposed ruler

JEAN-JUSTE V. DUVALIER. No. 86-0459 Civ.
U.S. District Court, S.D. Fla., January 8, 1988.

Plaintiffs, two citizens of Haiti, filed a complaint individually and on behalf of the Haitian people against defendants, Jean-Claude Duvalier and Michelle Bennett Duvalier, the deposed rulers of Haiti. The complaint alleged that the defendants had misappropriated vast amounts of public monies for their own personal use. Jurisdiction was alleged under the Alien Tort Claims Act (28 U.S.C. §1350 (1982)) and "under the law of nations."¹ After defendants failed to respond to the complaint, the U.S. District Court

¹⁶ *Id.* (citing *Dames & Moore v. Regan*, 453 U.S. 654 (1981)). The absence of the signature of President Carter or President Reagan on the Accords was also held to be irrelevant. *Id.*

¹⁷ *Id.* at 7.

¹⁸ *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, No. CV 87-03673-RG (S.D. Cal., order filed Feb. 17, 1988).

¹⁹ See note 10 *supra*.

¹ Plaintiffs' First Amended Complaint alleged jurisdiction under the Universal Declaration of Human Rights, the American Convention on Human Rights, the Charter of the United Nations, the Charter of the Organization of American States, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Declaration on Social Progress and Development.

for the Southern District of Florida entered a default judgment and awarded plaintiffs over half a billion dollars. The court cited no evidence showing that it had subject matter jurisdiction over the case, or that defendants were present in the United States or even that any of the assets allegedly stolen were present in the United States.

However, the court observed that defendants had been served while in exile in France. The court found that service of process was conducted in accordance with French laws in the appropriate manner.

In addition, the court noted that "[d]espite appropriate service of process, the Defendants failed to answer the Complaint, enter an appearance, or even seek a limited appearance challenging the jurisdiction of this Court."² Therefore, on September 2, 1986, the court entered a default judgment. Without discussing the possible legal challenges to the court's jurisdiction, or the controversial issues surrounding the Alien Tort Claims Act or the developing international law of human rights, the court concluded that it "is satisfied it does have jurisdiction in this case under the laws of the United States of America."³

Turning to the amount of the award, the court noted that extensive documentary and testimonial evidence of defendants' illegal activities had been presented to the court. This evidence included expert testimony about canceled checks and other bank transactions, as well as affidavits of former government officials. On the basis of this evidence, the court concluded that the defendants had "misappropriated more than \$504,000,000 from public monies and the Haitian treasury alone."⁴ Evidence indicated that additional monies had been taken by means of corrupt schemes such as direct bribes, kickbacks on state contracts and on licensing arrangements, tax breaks, and tax holidays for favored corporations. In addition, the individual plaintiffs offered evidence about the violation of their "rights . . . under the Duvalier regime."⁵

Based on the detailed evidence of damages, the court entered a final judgment against defendants pursuant to Federal Rule of Civil Procedure 55(b)(2). Plaintiffs were awarded \$504 million, to be distributed to the Haitian people under an "Economic Development Plan for Haiti" developed by the court. The individual plaintiffs were awarded \$1.75 million. Plaintiff Gérard Jean-Juste was awarded \$1 million "resulting from his inability to practice his religion freely and subsequent exile from his homeland."⁶ Plaintiff Etzer LaLanne was awarded \$750,000 "resulting from the deprivation of human rights as a result of physical and emotional torture incurred under the Duvalier regime."⁷

This order contains no analysis or discussion of the important legal issues raised by the complaint in the case. Even though the defendants did not respond to the lawsuit, a more detailed discussion of the jurisdictional issues

² No. 86-0459 Civ., slip op. at 1.

⁴ *Id.* at 2.

⁶ *Id.* at 4.

³ *Id.*

⁵ *Id.* at 3.

⁷ *Id.*

would have been preferable. If this case becomes accepted law, it seems likely that the U.S. courts will become a Mecca for human rights claims from all over the world and that these claims will be pressed to default judgments irrespective of proof of territorial or other contacts usually required before U.S. courts exercise jurisdiction.

It remains to be seen whether the judgment in this case will be enforceable.

War Powers Resolution—discretion to exercise jurisdiction—political question doctrine

LOWRY v. REAGAN. 676 F.Supp. 333.

U.S. District Court, D.D.C., December 18, 1987.

Over a hundred members of the U.S. House of Representatives brought suit seeking (1) a declaration that the War Powers Resolution (50 U.S.C. §§1541–1548 (1982)) (the Resolution) required the President to file reports concerning incidents in the Persian Gulf, and (2) an order requiring the President to submit a report concerning continued use of U.S. forces in the Persian Gulf. Under the Resolution, the filing of such a report would trigger the 60-day period after which the troops would have to be recalled unless Congress acted to extend that period. The U.S. District Court for the District of Columbia (per Revercomb, J.) granted defendant's motion to dismiss and *held*: the constraints of equitable discretion and the political question doctrine made exercise of jurisdiction inappropriate in this case.

The court began by describing the relevant provisions of the Resolution, which—as the court noted—was enacted over a presidential veto on November 7, 1973. The Resolution requires the President to consult with Congress “in every possible instance” before introducing U.S. military forces into hostilities and, in any event, to submit a written report to Congress within 48 hours of introducing U.S. forces “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”¹ The Resolution also requires the President to withdraw U.S. forces 60 days after such a report is filed unless Congress extends the period beyond that time.

Turning to the facts in this case, the court described various military incidents involving U.S. forces in the Persian Gulf. The court observed that Congress had debated various responses to this situation but had not enacted any provision into law.

The court next briefly summarized the parties' arguments. Plaintiffs argued that summary judgment was appropriate because the facts were drawn entirely from government sources and thus could not be disputed. Applying the statute to these undisputed facts, plaintiffs maintained that the reporting requirement had been triggered by the hostilities. Without challenging the

¹ 50 U.S.C. §1543(a)(1) (1982).

facts presented by plaintiffs, defendant contended—relying upon the doctrines of standing, political question and equitable discretion—that the case should be dismissed because it did not present a justiciable controversy. Defendant also maintained that because a private right of action cannot be implied under the Resolution, plaintiffs had failed to state a claim for which relief could be granted.

Accepting some—but not all²—of defendant's arguments, the court concluded that "exercise of federal jurisdiction in these circumstances would be both inappropriate and imprudent."³ Invoking the doctrine of "remedial discretion," and relying upon the absence of congressional consensus, the court refused to intervene in a dispute among members of Congress. "This Court declines to accept jurisdiction to render a decision that, regardless of its substance, would impose a consensus on Congress."⁴

Moreover, the court held that the political question doctrine precluded judicial determination of the issues presented. Again, the court relied upon the absence of congressional consensus as a basis for its decision. "Because this Court concludes that the volatile situation in the Persian Gulf demands . . . a 'single-voiced statement of the Government's views,' the Court refrains from joining the debate on the question of whether 'hostilities' exist in that region."⁵

Despite the holding dismissing these congressmen's claims, the court expressly stated by way of dicta that certain types of cases arising under the Resolution may be ripe for judicial review. The court observed that "[j]udicial review of the constitutionality of the War Powers Resolution is not, however, precluded by this decision. A true confrontation between the Executive and a unified Congress, as evidenced by its passage of legislation to enforce the Resolution, would pose a question ripe for judicial review."⁶ The court concluded its opinion by noting that "[a]lthough adjudication of constitutional questions should not be encouraged, the courts nonetheless would have the responsibility of resolving the constitutionality of this provision if it were properly presented."⁷

By dismissing this case but going out of its way to note that a different case could be justiciable, the court offered some guidance for future cases. The congressional consensus the court would require for judicial review is likely to result in a presidential decision on purely political grounds to withdraw troops long before judicial review can be rendered. This call for political consensus in Congress may serve the judiciary well as it attempts to fulfill its responsibilities.

² The court refused to consider the standing issue. 676 F.Supp. 333, 337 n.26. Moreover, the court concluded that if it had decided to exercise jurisdiction, "the availability of constitutional review indicates that the apparent absence of a private right of action is not fatal to this Court's equitable disposition of this case." *Id.* at 339.

³ *Id.* at 337.

⁴ *Id.* at 339.

⁵ *Id.* at 340 (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

⁶ *Id.* at 339.

⁷ *Id.* at 341.

ICSID ARBITRAL DECISION

Arbitration—contracts—international shipping—obligation of good faith performance—speculativeness of damages for future lost profits

MARITIME INTERNATIONAL NOMINEES ESTABLISHMENT v. REPUBLIC OF GUINEA. Case No. ARB/84/4.

International Centre for Settlement of Investment Disputes, January 6, 1988.

Claimant Maritime International Nominees Establishment (MINE), a corporation that entered into an agreement (the Convention) with respondent Republic of Guinea in 1971 for the formation of a company to exploit Guinea's substantial bauxite deposits, registered a claim with the International Centre for Settlement of Investment Disputes (ICSID) alleging that Guinea had breached the Convention by acting in bad faith to prevent performance of the agreement. Guinea countered that MINE was responsible for the venture's failure. MINE went to ICSID for relief after the United States Court of Appeals for the District of Columbia Circuit held that a U.S. district court lacked jurisdiction to enforce a \$27 million award rendered in favor of MINE by the American Arbitration Association. The three-member ICSID tribunal *held*: that Guinea had violated the Convention and was liable to MINE for damages and interest totaling nearly \$12.25 million.¹

The tribunal began by reviewing the history of efforts to mine and transport Guinea's huge deposits of bauxite (which is refined into aluminum) and the protracted litigation spawned by the failure of the company, SOTRAMAR, which was formed by MINE and Guinea pursuant to the Convention. Guinea had previously granted a group of major Western bauxite refiners the right to mine and purchase Guinea's bauxite, as well as the right to transport 50 percent of the bauxite freight; Guinea retained the other 50 percent of freight rights, upon which Guinea hoped to build a merchant marine flying the Guinean flag. Guinea then entered into the Convention with MINE for the establishment of SOTRAMAR, which was 49 percent owned by Guinea and 51 percent by MINE. Two and one-half years later, SOTRAMAR had failed to execute any contracts for shipment of bauxite to the bauxite refiners, and Guinea had negotiated a contract with a shipping consortium called AFROBULK to carry the freight originally intended for SOTRAMAR. After MINE learned of this arrangement, MINE began its efforts to obtain damages for Guinea's alleged bad faith in impeding SOTRAMAR's success and then entering into a freight agreement with a third party.

The tribunal found that although Guinea was unsophisticated in matters of international shipping while MINE was experienced and well financed,

¹ The tribunal awarded Guinea \$210,000 for its counterclaim, finding that MINE had improperly attached Guinea's property in other forums, in disregard of ICSID's exclusive jurisdiction over the dispute. The tribunal awarded Guinea less than its full expenses incurred in defending the attachments, however, because MINE's conduct was partially excused by other factors.

the Convention was a valid contract binding on both parties. "In hindsight," the tribunal observed, "the Convention failed because both parties had inflated expectations of what could be accomplished" with the freight rights retained by Guinea under its agreement with the bauxite refiners.² But Guinea breached the Convention, the tribunal held, by secretly entering into the agreement with AFROBULK to transport the bauxite that should have been transported by SOTRAMAR. The tribunal rejected Guinea's argument that the AFROBULK contract was necessitated by the failure of MINE to perform its obligations under the Convention. Guinea had never suggested to MINE that SOTRAMAR undertake the type of short-term freight arrangement that Guinea reached with AFROBULK. Moreover, MINE had repeatedly sought authority from Guinea to move forward with various charter and affreightment arrangements in order to make SOTRAMAR succeed, but Guinea did not act: "Guinea was simply not attuned to the shipping market, and it did not appreciate that moving ahead without proper planning could be fatal."³ Guinea's secret negotiation of the AFROBULK freight contract was held to have breached the Convention because it violated the principle of good faith performance of contracts set forth in the French Civil Code.⁴

With respect to damages, the tribunal rejected MINE's projections of future lost profits by SOTRAMAR, finding those projections too speculative in light of the fact that SOTRAMAR was a new venture that had never earned any profits at all. However, the tribunal accepted the general principle that MINE was entitled to be compensated in some manner for profits it would have earned had Guinea not breached the Convention. Accordingly, the tribunal awarded MINE damages measured by the revenues derived by Guinea during the 2 years that its agreement with AFROBULK was in effect, and projected those revenues over a 10-year period during which the bauxite refiners could reasonably be assumed to have continued to purchase bauxite. Adding a substantial sum for simple interest and costs, and offsetting an amount awarded to Guinea on its counterclaim,⁵ the tribunal awarded MINE approximately \$12.25 million.

The tribunal's decision provides a straightforward application of contract principles to a complex set of facts. Ultimately, the decision stands for the simple proposition that contracting parties—both private parties and states—must act in good faith both to further the purposes of, and to refrain from hindering, the contract. As to damages, the decision reflects the tribunal's unwillingness to accept complex projections of future lost profits for a venture with no track record to serve as a basis for such projections. Finally, the decision exemplifies the kinds of difficulties that can arise in the context of commercial efforts to exploit natural resources in developing countries.

² Case No. ARB/84/4, slip op. at 29, *reprinted in* INT'L ARB. REP., January 1988, at A.

³ Slip op. at 32.

⁴ The tribunal cited Article 1134 of the French Civil Code, without engaging in any discussion or explanation of its choice of law. The tribunal cited no other statutes or decisions.

⁵ See note 1 *supra*.

CORRIGENDUM

In the report of the decision of the Iran-United States Claims Tribunal in *Mobil Oil Iran Inc. v. Islamic Republic of Iran*, AWD 311-74/76/81/150-3 (July 14, 1987) (82 AJIL 136 (1988)), the words "lost profits" in the quotation from the Partial Award on page 140 at note 15 should be replaced with "alleged losses other than [damages for claimants' advances, investments, and withheld natural gas liquid and crude oil products]." The Tribunal modified the language quoted in the AJIL report in a formal Correction to Award dated July 17, 1987, but did not otherwise change the English text of the Partial Award.

CURRENT DEVELOPMENTS

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS FINDS UNITED STATES IN VIOLATION

The Inter-American Commission on Human Rights recently decided¹ that the United States Government had violated two provisions of the American Declaration of the Rights and Duties of Man. The proceeding involved two cases of persons convicted of crimes committed before their 18th birthdays, one in South Carolina and one in Texas. After all state and federal appeals were exhausted, the U.S. Department of State replied to the Commission's request for a stay of execution that "under the U.S. federal system, there are no domestic legal grounds for executive intervention in the implementation of the sentence."² The Governor of South Carolina refused a request from the Organization of American States to stay execution and the Governor of Texas did not bother to reply.

With the support of the American Civil Liberties Union and the International Human Rights Law Group, David Weissbrodt presented a brief to the Commission on behalf of the now deceased petitioners, to which the U.S. Government replied. On March 27, 1987, the Commission adopted its resolution by a vote of five to one.³

The decision of the Commission in this case found the United States to have violated human rights standards applicable in the inter-American system even though the United States had not ratified the American Convention on Human Rights and, when transmitting it for ratification, had specifically reserved on the issue of juvenile punishment.

The Commission held that the execution of these two individuals for crimes committed before they were 18 years of age violated Article I of the American Declaration of the Rights and Duties of Man, which states: "Every human being has the right to life" Petitioners had argued that the American Declaration should be read in the light of its purpose and other interpretive terms of the Vienna Convention on the Law of Treaties as expressing a norm of customary international law that prohibits the execution of minors. The Commission rejected this argument on the ground that the United States cannot be bound by "customary law" when it clearly does not, in this respect, accept such a binding principle. However, the Commission went further and held that the rule prohibiting execution of juvenile offenders had acquired the authority of *jus cogens*, a norm of international law from which no derogation is permitted. Unfortunately, the Commission did not elaborate on the notion of a regional *jus cogens*, or compare it to the notion of peremptory norm stated in Article 53 of the Vienna Convention,

¹ Res. 3/87, Case No. 9647, OAS/Ser.L/VII.71, Doc. 9 (1987).

² *Id.* at 149.

³ *Id.* at 150.

which defines *jus cogens* as a "norm accepted and recognized by the international community of States as a norm from which no derogation is permitted." Instead, the Commission found it sufficient that such a norm is accepted by the member states of the OAS, including the United States, although the latter disputes that a consensus exists on the age of majority.

The Commission also concluded that the United States had violated Article II of the American Convention (right to equality before the law) by failing to preempt actions of its constituent states regarding the right to life and thus permitting "a pattern of legislative arbitrariness." The Commission noted that because of the diversity of state practice, the death penalty could be applied to children as young as 10 years of age who committed a crime in one state, while in others it would be inapplicable even for adults committing the same crime.

The American Declaration of the Rights and Duties of Man, which the United States was held to have violated, is, of course, not a treaty. It was promulgated as Resolution XXX by the Ninth International Conference of American States, which adopted the Charter of the Organization of American States. The United States ratified the OAS Charter and is a member of the Organization. The introduction to Resolution XXX states that although the protection of human rights provided by American states under their domestic law was appropriate under existing conditions, international protection for such rights should be strengthened as conditions become more favorable; and it urges that "the international protection of the rights of man should be the principal guide of an evolving American law."⁴

The process of interpreting this "evolving guide" has been carried out by the Inter-American Commission on Human Rights. Since its organization in 1960, the Commission has consistently interpreted its powers broadly in light of its mandate to further respect for the human rights set forth in the American Declaration.⁵ Although the original Statute granted by the OAS Council to the Commission did not provide jurisdiction over individual complaints,⁶ the Commission ruled that it had power to investigate such complaints and to make recommendations to particular governments. In the face of the Council's repeated denials of requests to revise the Commission's Statute in this regard, the Second Special Inter-American Conference directed the inclusion of an amendment that, in effect, would ratify the Commission's interpretation of its powers.⁷

The Commission is not an international tribunal and its decision is not binding, as it would be if it were a decision of the Inter-American Court of Human Rights and the United States had ratified the American Convention

⁴ Res. XXX, 6 NINTH INTERNATIONAL CONFERENCE OF AMERICAN STATES, ACTAS Y DOCUMENTOS 297 (1953) [hereinafter Declaration]; see Fox, *The Protection of Human Rights in the Americas*, 7 COLUM. J. TRANSNAT'L L. 222 (1968).

⁵ On the evolution of the concept of the binding character of the Declaration, see Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AJIL 828 (1975).

⁶ OAS/Ser.L/V/II.1 (Sept. 26, 1960).

⁷ Res. XXII of the Second Special Inter-American Conference, OAS/Ser.L/V/II.14, Doc. 33 (1966); see Fox, *Doctrinal Development in the Americas: From Non-Intervention to Collective Support for Human Rights*, 1 N.Y.U. J. INT'L L. & POL. 44, 55 (1958).

and accepted the jurisdiction of the Court. However, the recommendation is an interpretation by an authorized body of independent experts of an international agreement to which the United States is a party and thus should be persuasive to U.S. courts interpreting the Eighth Amendment in the light of "evolving standards of decency."⁸

Finally, the Commission's recommendation raises the issue of United States ratification of the American Convention on Human Rights.

At the meeting of foreign ministers in 1959 when a treaty was first proposed to permit American states to take collective measures in support of human rights, the United States stated that it could not participate in such an endeavor.⁹ This isolationist position was reversed a decade later and a U.S. delegation participated actively in drafting the proposed San José treaty, which became the American Convention on Human Rights. The Convention entered into force in 1978 and has now been ratified by 18 members of the Organization of American States. When the treaty was submitted for ratification by President Carter, the Senate did not act favorably and it has not been resubmitted.

Will the Commission's recommendation provide further substance to the specter of foreign intervention in matters of U.S. domestic policy?¹⁰ Perhaps such a reaction would be offset by the observation that even if the United States chooses not to ratify the Convention, it may have acquired certain limitations on its freedom of disposition in human rights matters by virtue of membership in the OAS. As an international organization dedicated to the promotion of human rights and representative democracy, the OAS has a legitimate claim on the respect of its member states.

DONALD T. FOX*

SECOND SESSION OF THE UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Introduction

The second session of the United Nations Committee on Economic, Social and Cultural Rights, which took place in Geneva from February 8 to 26, 1988, marked a turning point in international efforts to promote the reali-

⁸ *Gregg v. Georgia*, 428 U.S. 153 (1976). On June 27, 1988, the Supreme Court decided (5-3) that at least minors under the age of 16 at the date of the crime could not be executed under state laws that did not set a minimum age. Four members of the majority concurred that "evolving standards of decency" would make the execution of such persons unconstitutional. *Thompson v. Oklahoma*, N.Y. Times, June 30, 1988, at A17, col. 1 (U.S. June 29, 1988) (No. 86-6169). In its October 1988 term, the Court will determine whether capital punishment of minors violates the constitutional ban on cruel and unusual punishment (*High v. Zant*, No. 87-5666; *Wilkins v. Missouri*, No. 87-6026). This Eighth Amendment ban is not as broad as Article XXVI of the American Declaration forbidding cruel, infamous or unusual punishment.

⁹ Res. VIII, Fifth Meeting of Consultation of Ministers of Foreign Affairs, Final Act, OEA/S.C./ILS (1960).

¹⁰ See Fox, *The American Convention on Human Rights and Prospects for United States Ratification*, 3 HUM. RTS. 243 (1973).

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zation of those rights.¹ In formal terms, the mandate of the Committee of 18 independent experts is to assist the Economic and Social Council (ECOSOC)² in carrying out its responsibilities relating to the implementation of the International Covenant on Economic, Social and Cultural Rights,³ to which there are now 91 states parties.⁴

In practice, however, the Committee has moved substantially beyond this formal advisory role and has begun to emerge as the principal forum in which the implications of the concept of economic, social and cultural rights are being explored. This development reflects an important transition from the sterile formalism that tended to characterize earlier UN efforts to deal with economic rights.⁵ It has been facilitated by several different factors. The first is the emergence of a certain shared understanding on the part of the members of the Committee, which has in turn enabled the gradual growth of that sense of esprit de corps which is virtually indispensable to the effective functioning of such a group. This process had been impeded at the Committee's first session by the reluctance of the expert from the USSR, E. Sviridov, to embrace any significant procedural innovations. However, in a significant demonstration of the potential international repercussions of *perestroika*, Sviridov's resignation was tendered prior to the opening of the second session. This and other developments led to a major improvement in the political climate affecting the work of the Committee and enabled it to continue to operate on the basis of consensus, a prospect that had seemed highly improbable at the conclusion of the first session.⁶ The second factor is the extent to which the notion of a "constructive dialogue" has been maintained as the basis of all of the Committee's deliberations. The result has been to remove, or at least reduce, the threat of politicization of its work and to provide reassurance to states parties to the Covenant that they will be treated fairly and constructively rather than in an adversarial manner. The third factor is a willingness by the Committee to begin its efforts to give substance to the theory (and rhetoric) of economic, social and cultural rights

¹ See generally Alston & Simma, *First Session of the UN Committee on Economic, Social and Cultural Rights*, 81 AJIL 747 (1987).

² The Committee was established pursuant to ESC Res. 1985/17. For its first report, see Committee on Economic, Social and Cultural Rights, Report on the First Session (9-27 March 1987), 1987 UN ESCOR Supp. (No. 17), UN Doc. E/1987/28.

³ GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966) [hereinafter *Covenant*].

⁴ Committee on Economic, Social and Cultural Rights, Report on the Second Session (8-26 February 1988), 1988 UN ESCOR Supp. (No. 4), UN Doc. E/1988/14, para. 1 [hereinafter *Committee's Second Report*].

⁵ See Alston, *Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332 (1987).

⁶ Alston & Simma, *supra* note 1, at 749. Because members of the Committee are experts elected by the Economic and Social Council, and because there is no provision for the nomination of a replacement or alternate of the same nationality, the Soviet expert could only have been replaced by a special election of the Council. Since the resignation was not tendered in time for that to happen, the seat of the Soviet expert remained vacant throughout the session. An experienced Soviet diplomat did, however, follow all of the Committee's meetings.

by going back to reexamine the fundamental premises of UN action in this field. A fourth factor that has enabled the Committee to begin to develop into an effective advocate of economic rights is the acceptance by states⁷ (and by the members of the Committee themselves) of the principle that, for most intents and purposes, the Committee should be treated on the same footing as the Human Rights Committee, which monitors compliance with the "other" Covenant, dealing with civil and political rights.⁸ Finally, it is clear that the advent of *perestroika* in the economic, social and cultural fields in Eastern Europe has begun to reduce the fundamental East-West ideological differences that for so long have bedeviled international efforts in this field. As a result, there is a greater sense of shared challenges and a reduced desire to seek to exploit the difficulties or inadequacies of any particular socioeconomic system.

The principal achievements of the Committee's second session were procedural rather than substantive. This is to be welcomed, however, since greatly improved procedures are an indispensable prerequisite to the achievement of more significant substantive results in this field. The procedural innovations that were adopted emerged both from formal discussions on the Committee's methods of work (in the framework, initially, of a working group and, subsequently, of the Committee as a whole) and from the precedents that were established indirectly in examining 15 reports submitted by some 13 states parties.⁹ The analysis that follows focuses more on the future evolution of the Committee's work in the light of decisions taken at the 1988 session than on the precise details of the deliberations. In particular, the outcomes of its "evaluation" of the reports of specific states parties are only noted insofar as they are relevant to the issues the Committee is likely to emphasize, and the procedures it is likely to adopt, in the future.

Improving the Understanding of the Normative Content of Economic Rights

It is generally recognized that the precise normative content of most of the rights contained in the Covenant is substantially less well understood, or identifiable, than is the case for the majority of civil and political rights. Among the reasons for this situation are the vast scope of some of the rights

⁷ Thus, in December 1987, the General Assembly specifically invited the Committee, in considering its future work, to pay "particular attention to practices followed by other treaty bodies." GA Res. 42/102, para. 5 (Dec. 7, 1987).

⁸ The Human Rights Committee was established in accordance with Article 28(1) of the International Covenant on Civil and Political Rights, GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966). For reviews of its work, see Nowak, *The Effectiveness of the International Covenant on Civil and Political Rights: Stocktaking after the First Eleven Sessions of the UN Human Rights Committee*, 1 HUM. RTS. L.J. 136 (1980); Nowak, *UN Human Rights Committee: Survey of Decisions Given up till July 1984*, 5 *id.* at 199 (1984); and Nowak, *UN Human Rights Committee: Survey of Decisions Given up till July 1986*, 7 *id.* at 287 (1986).

⁹ The states parties whose reports were examined are Zaire (3 reports), Austria and Chile (2 reports each), and Bulgaria, the Byelorussian SSR, Denmark, Mongolia, Norway, Romania, Sweden and Yugoslavia.

concerned (e.g., the right to an adequate standard of living), their relative novelty, the difficulty of rendering some of them justiciable or otherwise implementing them through "traditional" means, the relative lack of experience with such rights at the national level, the complexity of the relationship between the obligations incumbent upon states and the availability of financial resources, the absence of detailed international standards (except with respect to labor rights), and the poverty of studies that have been undertaken of specific economic rights qua rights.

At its second session, the Committee recognized that the normative content of each of the relevant rights must be spelled out more clearly for it to lay the foundations for the effective exercise of its basic monitoring and catalytic functions. It addressed this need by adopting two new activities, one of which has long been undertaken by the Human Rights Committee, while the other is entirely novel. They are, first, the elaboration of "general comments" and, second, the holding of an annual in-depth discussion on a specific right or article of the Covenant.

The stated purposes of the general comments are:

to make the experiences gained so far through the examination of . . . reports available for the benefit of all States parties in order to promote their further implementation of the Covenant; to draw the attention of the States parties to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedures; and to stimulate the activities of the States parties, the international organizations and the specialized agencies concerned.¹⁰

The proposal could be adopted unanimously for several reasons. Perhaps the most important is the precedent set by the very effective use of general comments by the Human Rights Committee as a means of communicating to states its understanding of the various rights and its perception of the specific issues on which states parties should report.¹¹ Although some of the specific comments it has adopted have been criticized by certain states, the criticism has been directed not at the practice of adopting comments per se but at the alleged *ultra vires* scope of some additional topics chosen for elaboration.¹²

Another reason for the noncontroversial nature of the proposal is that no attempt was made to suggest that the comments should be used as a vehicle for criticizing the performance of a particular state, as has been proposed in the Committee on the Elimination of All Forms of Discrimination Against

¹⁰ Committee's Second Report, *supra* note 4, para. 369.

¹¹ For a description of the principles governing the work of the Human Rights Committee in the formulation of general comments, see Report of the Human Rights Committee, 39 UN GAOR Supp. (No. 40) at 106-09, UN Doc. A/39/40 (1984).

¹² Particular criticism was directed at the Committee's general comment 14(23), reproduced in Report of the Human Rights Committee, 40 UN GAOR Supp. (No. 40) at 162-63, UN Doc. A/40/40 (1985) ("the designing, testing, manufacture, possession and development of nuclear weapons are among the greatest threats to the right to life which confront mankind today"). For the Committee's response to the criticism, see *id.* at 6, paras. 26-27.

Women (CEDAW).¹³ Indeed, such a proposal was carefully avoided because of (1) the extent to which it could jeopardize the important principle involved; (2) the fact that specific "violations" are perhaps less likely to emerge in the context of economic rights than of discrimination against women; and (3) the decision to permit individual members of the Committee to make concluding observations at the end of the examination of each state's report,¹⁴ in the course of which any appropriate criticisms can readily be placed on record.

The procedure for drafting general comments¹⁵ is to be, in several respects, more flexible than that followed by the Human Rights Committee. In the first place, proposals may be made and drafts circulated by members at any time, whether the Committee is in session or not. There is thus no possibility that a proposal will be vetoed before it even gets off the ground. The agreed procedure also makes no specific reference to the need for a general comment to be adopted by consensus (i.e., unanimity), which seems appropriate. Although in principle it would be undesirable to have to adopt a general comment by majority vote, the possibility for any single persistent objector to foil the will of the rest of the Committee should not be entrenched through absolute insistence upon "consensus."

The second means by which the Committee will seek to develop understanding of the normative content of the rights in the Covenant is through the holding of an annual "general discussion" focused on a particular right or cluster of rights contained in a single article.¹⁶ The rationale underlying this decision accords closely with the vision expressed by many of the framers of the Covenant, who wanted the supervisory function to be used primarily as a means of exchanging information among states, highlighting shared problems and difficulties, and encouraging the emulation of successful practical initiatives designed to ensure respect for the relevant rights.¹⁷ The Committee is not currently playing any of these roles effectively. Although it and its predecessor together have examined almost 170 reports by states parties,¹⁸ there has never been any attempt to draw broad conclusions

¹³ At its sixth session, in 1987, CEDAW decided that the "suggestions and general recommendations" that it is empowered to make under Article 21 of the Convention on the Elimination of All Forms of Discrimination Against Women (GA Res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46 (1979)) could, "in an appropriate case," be "based on the examination of a report and information received from a State party." This proposal was adopted despite the objections of several experts that recommendations should be addressed not to a single state party but "to all States parties in a general way." See Report of the Committee on the Elimination of Discrimination Against Women, 42 UN GAOR Supp. (No. 38), paras. 57-60, UN Doc. A/42/38 (1987).

¹⁴ See text at notes 44-46 *infra*.

¹⁵ Committee's Second Report, *supra* note 4, para. 370. The procedure draws upon that followed by the Human Rights Committee and by CEDAW.

¹⁶ *Id.*, para. 365.

¹⁷ See generally Annotations on the Text of the Draft International Covenants on Human Rights: Prepared by the Secretary-General, UN Doc. A/2929, at 116-25 (1955) [hereinafter Annotations].

¹⁸ Committee's Second Report, *supra* note 4, para. 368.

of general utility and applicability from the experience. There has thus been no context in which the Committee could seek to synthesize the results of its work or to reflect on the emergence of any consistent patterns with respect to problems, achievements or other dimensions of the experience of states. The 1-day "general discussion" will enable members of the Committee not only to draw upon the wealth of information provided in the accumulated reports of states parties, but also to reflect upon and discuss any other relevant reports or materials, whether from UN, governmental or NGO sources, dealing with the specific right in question. The discussion could also be used as an opportunity to request specific inputs to the Committee from any or all of these sources.

The new mechanism is clearly not designed to focus on the specific problems confronted by, or the violations alleged to have been committed by, an individual state party to the Covenant. The desired outcome is more akin to an improved understanding of the central issues by the members of the Committee themselves, the states parties and all others with an interest in the substance of the Committee's work. While the general discussion will not necessarily be linked in any way to the elaboration of "general comments," it would nevertheless seem logical for the former to give rise, from time to time, to specific proposals for general comments and to serve as an occasion for debating preliminary suggestions as to their content.

To avoid any suggestion that the Committee will be "wasting" time on its general discussions that could otherwise be used to examine states' reports, the Committee agreed to schedule its discussion day during the final week of each session, by which time it is too late (for logistical reasons) to consider states' reports.¹⁹ It also agreed that the focus of its first general discussion, to be held in 1989, would be Article 11 of the Covenant,²⁰ which deals, inter alia, with the rights to food and housing. The Committee will thus have an important and unprecedented opportunity to examine and discuss the report of the special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the right to adequate food²¹ and to react to various resolutions by the General Assembly and the Commission on Human Rights dealing with the right to housing.²²

Improving the Quality and Relevance of States' Reporting

The quality of the Committee's output is linked inextricably to the quality of the inputs it receives. The most important input of all is the report that must be provided from time to time by states parties to the Covenant de-

¹⁹ *Id.*, para. 365. The logistical constraints are attributable to the need for the Secretariat and the rapporteur to draft a summary of the examination of each report, for the summary to be typed and translated, and for a review of each draft by the full Committee prior to adoption.

²⁰ *Id.*

²¹ Eide, Report on the Right to Adequate Food as a Human Right, UN Doc. E/CN.4/Sub.2/1987/23.

²² E.g., Comm'n on Human Rights Res. 1987/22, 1987 UN ESCOR Supp. (No. 5) at 71, UN Doc. E/1987/18; and GA Res. 42/146 (Dec. 7, 1987).

tailoring "the measures which they have adopted and the progress made in achieving the observance of the rights recognized"²³ and providing an indication of "factors and difficulties affecting the degree of fulfilment of obligations."²⁴ At its second session, the Committee adopted a fundamentally different approach to these reports and recommended the abandonment of the existing system, in which each individual state report deals with a different cluster of rights (those contained in Articles 6 to 9, 10 to 12, or 13 to 15).²⁵ After the initial cycle was completed, these reports were due once every 3 years; hence, a complete reporting cycle was spread over 9 years.²⁶ As a result, a state that reported in 1988 on, say, the right to work, would not be expected to do so again until 1997 at the earliest. The Committee found at least three major problems in this system. In the first place, the division of articles (or rights) into three clusters means that at no stage does the state have to provide a global overview of the situation with respect to economic, social and cultural rights. Instead, the reports are divided up, quite arbitrarily in some respects, which conceals how closely the various rights are interrelated (such as the right to social security in Article 9, and the right to an adequate standard of living in Article 11). Consequently, the Committee is given only a partial, and inevitably inadequate, glimpse of the actual situation in the reporting state. Second, the reporting burden placed on states (both rich and poor) is enormous, since a new report must be submitted every 3 years. Under the circumstances, the backlog of overdue reports is hardly surprising.²⁷ Third, the Committee itself is called upon to review an excessive number of reports. This cumbersome and time-consuming system thus holds a number of built-in incentives to delay reporting, providing states with a ready-made justification for consolidating several reports into one.

The existing system was originally justified by considerations that are no longer valid. In essence, the rationale was to separate the rights into clusters that coincided with the range of concerns of given UN specialized agencies. Thus, by putting Articles 6 to 9 together (dealing with different aspects of the right to work and social security), almost all of the International Labour Organisation's concerns could be taken care of in a single report. Similarly, by bracketing Articles 13 to 15 (dealing with education, science and culture), only UNESCO needed to be involved with that part of the reporting cycle. But this accommodating timetable for reporting is now an anachronism since in practice the specialized agencies either have been accorded (in

²³ Covenant, *supra* note 3, Art. 16(1).

²⁴ *Id.*, Art. 17(2).

²⁵ This reporting program had been established by ESC Res. 1988 (LX), para. 1, 60 UN ESCOR Supp. (No. 1) at 11, UN Doc. E/5850 (1976).

²⁶ ESC Decision 1985/132, 1985 UN ESCOR Supp. (No. 1) at 42, UN Doc. E/1985/85.

²⁷ According to information provided to the Committee by the Centre for Human Rights, a total of 136 reports were overdue as of Feb. 8, 1988. Of 91 states parties, 63 have overdue reports. The statistical breakdown was as follows. Out of these 63 states, 56 have the initial reports overdue: 25 have all 3 reports overdue; 12 have 2 overdue; and 19 have 1 overdue. Out of these 63 states, 15 have their second periodic report overdue; 3 states have 2 overdue reports, and 12 have 1 overdue report. Committee's Second Report, *supra* note 4, Ann. 1.

the case of the ILO), or have only been prepared to accept (in the case of the others), a rather insignificant and formalistic supervisory role.²⁸

The Committee has thus opted to call upon states to submit a single report dealing with the whole Covenant once every 5 years.²⁹ This should reduce the total number of reports submitted, ease the workload of the national officials charged with preparing the reports, facilitate the Committee's appreciation of the overall situation in the state concerned and make the whole reporting process much more comprehensible to the public at large. It will also make it possible to synchronize the reporting schedule with that established under other treaties and to organize it so that different states can be designated to report in different years, which will facilitate the consideration of reports within a year of their preparation (in contrast to the lengthy delays sometimes experienced under the present system).

Two other means of improving the reports of states parties were also considered. It was decided that the Committee would undertake, at its third session, a concerted effort to revise and simplify the guidelines that are provided to assist states in determining what information should be provided.³⁰ In addition, the Committee suggested that states seek to involve appropriate nongovernmental groups in the process of preparing the reports.³¹ At the second session, Norway³² indicated that such input is already being made, and Bulgaria³³ announced that it would follow that approach in the future.

Enhancing the Dialogue between the Committee and Individual States Parties

The principal assumption underlying the "monitoring" of states' compliance with the obligations of the Covenant is that a "constructive dialogue" between the members of the Committee and the representative(s) of the state party will occur when the latter's report is presented to the Committee. Under existing procedures, a "dialogue" of sorts does indeed take place. Whether or not it is "constructive" is a different matter. That term has at least two connotations in this context: (1) the opposite of destructive, in the sense that the relationship should not be adversarial; and (2) focused and productive, in the sense of enabling the Committee to act as a catalyst to improve the existing situation.

At its second session, the Committee made considerable gains over the performance of its predecessor (the Economic and Social Council's Sessional

²⁸ See generally Alston, *supra* note 5, at 362-67.

²⁹ Committee's Second Report, *supra* note 4, para. 351. Some concern was expressed by a few members that the requirement of a single 5-yearly report would not be in accordance with the provisions of Article 17(1) of the Covenant, which provides that states parties "shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council." The *travaux préparatoires* of the Covenant make it clear, however, that this wording was not intended to restrict the Council's discretion in any way. See Annotations, *supra* note 17, at 118.

³⁰ Committee's Second Report, *supra* note 4, para. 352.

³¹ *Id.*

³² UN Doc. E/C.12/1988/SR.15, para. 5.

³³ UN Doc. E/C.12/1988/SR.19, para. 63.

Working Group of Governmental Experts)³⁴ in the first sense of maintaining a civil and nonadversarial dialogue. This advance was illustrated in particular by the case of Chile, which presented two separate reports (dealing, respectively, with Articles 10 to 12, and 13 to 15). When Chile had first appeared before the Committee's predecessor, in 1981, its report was in effect rejected outright. In a perfect display of the double standards that seem unavoidably to plague some of the UN human rights endeavors, the representatives of the USSR, the German Democratic Republic, Bulgaria and Libya persuaded the Committee to invite the Chilean Government to submit additional information without having posed a single question to the government representative or cited any specific facts (except indirectly by reference to UN reports whose content was not specifically discussed).³⁵ This time around, the Government was presented with a comprehensive and detailed set of questions that provided evidence for the concerns expressed by members of the Committee. To its credit, the Government responded in considerable detail, although its responses did little to dispel the grave doubts evinced by the Committee.³⁶

Similarly, in dealing with three reports submitted by Zaire, and presented by the Minister for the Protection of Citizens' Rights and Freedoms, the Committee succeeded in maintaining a constructive dialogue despite the following clear convictions of several members: the requirement that a married woman obtain her husband's permission to work outside the house violated Article 3 of the Covenant; the deliberate abolition of *free* primary education constituted a clear violation of Article 13; the absence of any detailed plan to restore it contravened Article 14; and the automatic membership of all citizens in the People's Movement for the Revolution was inconsistent with the principles governing freedom of association.³⁷

To enhance the constructiveness of the dialogue, in the second sense of the term, the Committee adopted a variety of procedural innovations designed to achieve a more streamlined, focused and productive discussion. First, it proposed the establishment of a working group that would "identify in advance the questions which might most usefully be discussed with the representatives of States parties."³⁸ The objectives are to eliminate some of the duplication in questioning that the present ad hoc system inevitably produces, to reduce the likelihood that issues of major importance will accidentally be overlooked and to give the representative at least some advance warning of the issues most likely to be pursued by the Committee. The Committee also authorized its Chairperson, after consultation with members of the working group, to ask states parties for additional information before their reports are considered where the reports fail to deal with

³⁴ See generally Commentary, *Implementation of the International Covenant on Economic, Social and Cultural Rights: ECOSOC Working Group*, ICJ REV., No. 27, December 1981, at 26.

³⁵ UN Doc. E/1981/WG.1/SR.7, paras. 11-34.

³⁶ UN Docs. E/CN.12/1988/SR.12, paras. 36-64; and E/CN.12/1988/SR.13, paras. 1-48.

³⁷ UN Docs. E/CN.12/1988/SR.16-19.

³⁸ Committee's Second Report, *supra* note 4, para. 361.

outstanding issues raised when the previous report was examined,³⁹ or are clearly incomplete in terms of the types of information requested in the reporting guidelines.⁴⁰

The Committee's second session saw a substantially more constructive use of available sources of information, other than those contained in the governments' reports. For example, considerable use was made of statistical information provided by the Secretariat at the Committee's request;⁴¹ direct reference was made to information emanating from NGO sources;⁴² and information provided by the ILO was taken directly into account in questions posed by members.⁴³ As a result, there is every reason to believe that the Committee will eventually be able to draw upon a sufficiently diverse, precise and authoritative range of information to ensure that the dialogue with states parties proceeds on the basis of much more than the government's own version of the situation.

In addition, the Committee succeeded in making far more effective use of the limited time available to it by imposing strict time limits of 15 minutes for the introduction of the state party's report; 90 minutes for questioning by the Committee; 60 minutes, preferably at a subsequent meeting, for a reply by the state party; and 15 minutes for "concluding observations" by members of the Committee.⁴⁴ These rules proved highly conducive to more precise and incisive questioning by members and provided an incentive for government representatives to provide additional information or responses to the Committee in writing. Moreover, the final period of 15 minutes represents an innovation of major importance since it allows individual members to indicate the extent to which they were satisfied (or otherwise) with the preceding dialogue. At the second session, this opportunity was used very unevenly; some states' reports "escaped" almost without any substantive concluding observations, while others were subjected to lengthy and detailed comments. This unevenness was principally a function of the novelty of the technique,⁴⁵ which may be expected to work much more

³⁹ *Id.*, para. 359.

⁴⁰ *Id.*, para. 360. This provision is modeled on the practice of CEDAW. See its 1987 report, *supra* note 13, para. 49.

⁴¹ In accordance with ESC Res. 1987/5, para. 13 (May 26, 1987).

⁴² E.g., UN Doc. E/C.12/1988/SR.13, para. 23. In 1987 the Committee became the first of the UN human rights treaty-monitoring bodies to be able to receive information from NGOs. The procedure was established by ESC Res. 1987/5, *supra* note 41, in para. 6 of which the Council invited

...non-governmental organizations in consultative status with the Council to submit to it written statements that might contribute to full and universal recognition and realization of the rights contained in the International Covenant on Economic, Social and Cultural Rights, and requests the Secretary-General to make those statements available to the Committee in a timely manner.

⁴³ E.g., UN Doc. E/C.12/1988/SR.13, para. 12.

⁴⁴ Committee's Second Report *supra* note 4, para. 364.

⁴⁵ The Committee recognized this problem when it agreed to insert a paragraph to the following effect in its summary of its examination of Austria's report:

In the course of the adoption of the present summary it was noted that there appears to be an imbalance in the extent and nature of the concluding observations made with respect

smoothly at future sessions. The opportunities afforded by the new procedure for implicit performance evaluations stand in marked contrast to the bland, but misleading, practice followed at the Committee's first session, where the Chairperson, purportedly on behalf of the Committee, offered an identical concluding expression of thanks with respect to each and every state party's report, regardless of its adequacy.⁴⁶

Conclusion

In the broader scheme of things, the second session of the Committee on Economic, Social and Cultural Rights represented a major breakthrough in the effort to treat those rights as though they were in practice, and not only in UN theory, equal in importance to civil and political rights. As in all areas of international relations, and particularly in human rights, the roles played by the two superpowers were critical elements in this development. On the Soviets' part, the spirit of "openness" (*glasnost*) and "restructuring" (*perestroika*) led not only to the resignation of the former Soviet expert prior to the session,⁴⁷ but also, and more importantly, to a significantly more open and progressive approach to the issues on the part of the other experts from Eastern Europe.⁴⁸ This change reflects two developments of fundamental long-term significance for the future of economic, social and cultural rights. The first is the growing reliance on market mechanisms in economic decision making, as a result of which the differences between capitalist and socialist approaches to the rights in question are being greatly reduced. The second is the increasing justiciability of economic and social rights in the USSR. For example, in response to recognition of the fact that "instances of violation of rights, especially of labor, housing, and certain others, and of violation of the procedure for handling and resolving complaints . . . are still quite widespread,"⁴⁹ a new law has been introduced giving any Soviet citizen "the right to appeal to court if he considers that his rights have been violated by the actions of an official."⁵⁰ The law, which entered into force

to the report of Austria compared to those made with respect to the reports of some other States considered at this session. It was explained that this is attributable not to the particular details of the report of Austria and of its presentation but to the relative newness of the procedures adopted by the Committee in making concluding observations.

Id., para. 48.

⁴⁶ "In concluding the consideration of the report, the Chairman thanked the representative of the State party for having co-operated with the Committee in a spirit of constructive dialogue and with the common objective of implementing the rights recognized in the Covenant." Report on the First Session, *supra* note 2, paras. 35, 66, 85, 114, 149, 169, 220, 259 and 297.

⁴⁷ See *supra* note 6. The USSR subsequently nominated Professor V. Kusnetzov for election to the Committee.

⁴⁸ Mr. W. Neneman from Poland and Mr. V. Mrachkov from Bulgaria.

⁴⁹ Remarks by a deputy of the Supreme Soviet, *quoted in* *Izvestia*, July 2, 1987, at 5, and *cited in* Quigley, *The New Soviet Law on Appeals: Glasnost' in the Soviet Courts*, 37 INT'L & COMP. L.Q. 172, 173 n.3 (1988).

⁵⁰ Law on the Procedure for Appealing in Court the Unlawful Actions of Officials that Infringe the Rights of Citizens, *VEDOMOSTI VERKHOVNOGO SOVETA SSSR*, No. 26, 1987, item 389, Art. 1. See Quigley, *supra* note 49, at 172.

on January 1, 1988,⁵¹ brings some aspects of the Soviet approach to economic rights much closer than ever before to those of most Western countries. This convergence can only augur well for further development of a perceived commonality of interest across the East-West divide.

The influence of the other superpower on the work of the Committee, of course, is much less visible. Since the United States has failed to ratify the Covenant, it is not in a position to nominate an expert for election to the Committee. Had the present U.S. administration been able to do so, the consensus in the Committee might have been jeopardized by an unproductive debate over whether economic rights are really human rights at all. Given the administration's recent repudiation⁵² of the 1969 Declaration on Social Progress and Development,⁵³ which had long been seen by most development and human rights experts as the single most important and coherent statement of Western liberal values on the subject, it is difficult to lament the U.S. absence. By the same token, however, it is regrettable that the United States has abdicated its opportunity to influence the shape of UN action in this field, which, whether or not a particular American administration approves, will have an abiding impact on international attitudes and perceptions.

Against this background, the Committee's second session was notable for its movement away from the automatic taking of positions by members in accordance with their geopolitical or ideological affiliations. While such an approach is inevitably characteristic of the UN political organs in the human rights field, it is anathema to the healthy development of an effective expert committee. Thus, at its second session, the Committee abandoned the practice of rotating the membership of the Bureau on geopolitical lines, worked through a sessional working group that was effectively open-ended rather than being finely tuned along regional lines, and held debates in which members consistently took positions that failed to accord exactly with those expected of them on the basis of their national origins.

The final observation to be made on this session concerns the manner in which the Committee coped with its unique hybrid role as an entity responsible for treaty supervision that is answerable not to the states parties to the

⁵¹ *Id.* n.2(a).

⁵² In November 1987, the U.S. representative (Ms. Byrne) told the Third Committee of the General Assembly

that the United States would no longer adhere to the Declaration on Social Progress and Development. The Declaration had been adopted at a time when ideas about the role of Government in social development and in providing social welfare were very different. The United States had learned that Government, even in the richest countries, could not alone provide massive social welfare programmes on a scale such as that suggested in the Declaration. Individual needs varied so greatly that centralized social welfare schemes were often counterproductive to the effort to allow all individuals to become self-sufficient and independent. In the United States, the contribution of the private sector and of State and local Governments to social progress and development were an essential part of all effective social programmes.

UN Doc. A/C.3/42/SR.32, para. 1 (1987).

⁵³ GA Res. 2542 (XXIV), 24 UN GAOR Supp. (No. 30) at 49, UN Doc. A/7630 (1969).

treaty but to one of the principal political organs of the United Nations, the Economic and Social Council. At its first session, members tended, somewhat inconsistently, to emphasize one role *or* the other, depending on the circumstances. By the end of its second session, however, it had become clear that the Committee could consistently have the best of both worlds. Thus, on the one hand, there is a clear consensus that it should seek to emulate, as far as appropriate, the practices and procedures of the "independent" treaty-based supervisory bodies such as the Human Rights Committee. On the other hand, its formal status as a subsidiary organ of the Council means that the most divisive political issues can be fought out within the Council while the Committee gets on with the rest of its work in a relatively nonpoliticized context.⁵⁴

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⁵⁴ It is also worthy of note that the Committee's status as a subsidiary organ of ECOSOC insulates it, to some extent, from the full force of the UN financial crisis, which has significantly affected the work of some of the other supervisory committees. See Gaer, *Financial Crisis at the UN*, HUM. RTS. INTERNET REP., No. 5/6, 1987, at 58.

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BOOK REVIEWS AND NOTES

EDITED BY DETLEV VAGTS

REVIEW ARTICLE

NATIONAL LEGAL SYSTEMS AND PRIVATE DISPUTE RESOLUTION

International Commercial Arbitration in New York. Edited by J. Stewart McClendon and Rosabel E. Everard Goodman. New York: The World Arbitration Institute; Dobbs Ferry, N.Y.: Transnational Publishers, Inc., 1986. Pp. xvi, 326. Index. \$35, cloth; \$25, paper.

Law and Practice of International Commercial Arbitration. By Alan Redfern and Martin Hunter. London: Sweet & Maxwell, 1986. Pp. xliii, 462. Index. \$173. £64.

Le Règlement des litiges civils et commerciaux avec les Etats-Unis. By Patrick Thieffry and Christine Lecuyer-Thieffry. Paris: Jupiter, 1986. Pp. xiv, 399. Index. F.290.

Arbitration of transnational commercial disputes has become a business. Countries and cities vie for a greater share of the fees paid to arbitrators and attorneys, particularly at the seat of an arbitration.¹ The marketing strategy of some nations includes reform of arbitration law, which members of the local bar have energetically publicized.²

Idiosyncrasies of national law come into play in nonjudicial dispute resolution when one party to the controversy regrets having agreed to binding arbitration, or sees the arbitration as unfolding in an unfair manner. The unhappy contender may invoke the procedural and/or substantive norms of several jurisdictions to vitiate or to modify the arbitral process. The efficiency and fairness of international arbitration thus depend on how national legal systems deal with arbitral agreements, proceedings and awards.

¹ This rivalry coincides with a trend toward "lawyerizing" in nonjudicial dispute resolution. For a poignant description of the "end of innocence" of international commercial arbitration, see Jan Paulsson's note at 1 ARB. INT'L 2 (1985). For a critique of "the legalization of the arbitration process," see J. AUERBACH, JUSTICE WITHOUT LAW 109-14 (1983).

² When, in 1979, England enacted legislation to limit judicial review of arbitration awards rendered in London, Lord Cullen of Ashborn estimated that this reform would bring England £500 million of "invisible exports" such as arbitrators' and lawyers' fees. 392 PARL. DEB., H.L. 5th ser.) 99 (1979). See Park, *Judicial Supervision of Transnational Commercial Arbitration*, 21 ARB. INT'L L.J. 87 (1980). The French, in 1981, and the Belgians, in 1985, modernized their arbitration law in an attempt to keep and/or to capture a share of the dispute resolution market. The Swiss recently amended their federal conflicts-of-law procedure to permit foreign parties to limit judicial annulment of an award. See *Loi fédérale sur le droit international privé*, Arts. 176-95 (text of Dec. 18, 1987) (not yet in force).

Three books by American, British and French practitioners provide differing perspectives on the interaction of judge and arbitrator. Seeking to attract to New York some of the cases that have traditionally gone to London, Paris and Geneva, the World Arbitration Institute³ has produced a collection of essays on federal and state arbitration law. Two British solicitors have examined the legal aspects of international arbitration in a general survey that goes beyond the law of the sceptered isle. The French contribution comes from two Paris lawyers who have written about aspects of both arbitration and litigation in the United States.

I. THE VIEW FROM NEW YORK

The essays edited by McClendon and Goodman present a valuable guide to the nitty-gritty of commercial arbitration in New York. They cover the agreement to arbitrate, commencement of the proceedings, appointment of an arbitrator, hearings, interim measures, applicable law and challenge to awards. Extensive notes to cases make it a particularly useful tool for both practitioners and scholars. Appendixes include portions of relevant federal and state statutes, the 1958 New York Arbitration Convention and the rules of major arbitral institutions active in New York. Surprisingly, the book gives no statistics indicating whether consumers of international arbitration favor New York over other cities. Experience with arbitration under the Rules of the International Chamber of Commerce would lead to the suspicion that the book attempts to reverse a disappointing track record rather than to prolong a successful run.⁴

The Yankee peddlers showing arbitral shoppers the wares offered in the Big Apple are 14 talented lawyers of enviable credentials and reputation, well-known and well respected by arbitration connoisseurs worldwide. Except for one of the editors, all practice with major American firms. As is frequent in cooperative ventures, the essays are not of even quality. Nor are they always responsive to the book's audience.

Foreign readers might have expected sharper focus on the interplay of state and federal law. Several essays suggest that one need not worry about the complexity of the federal system because state law applies to international arbitration "only to the extent that its provisions are not more restrictive" than those of federal law (pp. 7, 19 and 41). The meaning of "not more restrictive," however, is less than self-evident, especially with respect to provisional measures such as pre-award attachment, which may defeat some objectives of arbitration while furthering others.⁵ Authorities are di-

³ "World" may seem rather impertinent. The institute is a program of the American Arbitration Association established "to foster the use of New York City as a venue" for international commercial arbitration (p. xiii).

⁴ See W. CRAIG, W. PARK & J. PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION App. I, table 7 (1984). During the years surveyed (1980-1982), the United States was established as the place of arbitration in less than 5% of the cases, as compared with 33% for France, 27% for Switzerland and 9% for the United Kingdom.

⁵ Pre-award attachment in support of arbitration increases the winner's chances of enforcing the award, but it interjects national court proceedings that the parties intended to avoid. Compare *McCreary Tire & Rubber v. CEAT*, 501 F.2d 1032 (3d Cir. 1974) (holding that the

vided (as one essay acknowledges on pp. 99–113) on whether a federal court must grant attachments available under the law of the state where it sits. Moreover, disputes often end up in state courts in circumstances where it may not be clear, until after years of expensive appeals, that state law is preempted by federal statute.⁶ Particularly uncertain is the impact of a state law with no corresponding provision in the Federal Arbitration Act. Scholars and practitioners must acknowledge that the contours of federal preemption here are ill-defined.⁷

Not all of the essays make clear the distinctions between the different stages and aspects of the arbitral process. Elliptical references to enforcement of foreign awards (a topic excluded from the book's coverage) appear in a section on *vacatur* of local awards (pp. 136–42) without explanation of its nexus to the section's subject. In one chapter, a treaty defense to recognition of awards dealing with nonarbitrable subject matter is presented as a justification for a court's refusal to enforce an agreement to arbitrate (p. 34), without explanation of the problematic mechanism by which a defense to an award works its way back into the part of the treaty dealing with agreements to arbitrate.

Arbitration is consensual, and the arbitration clause itself requires considerably more attention than parties usually give to future disputes when preparing for the trip home. The thoughtful essay by Aksen and Connolly explores the essential and useful elements of the agreement to arbitrate. Such a clause ought to be drafted with an eye to reducing uncertainties on the day when there will be a dispute, and perhaps an award. Therefore, several matters dealt with here are treated in later chapters.⁸ Any work where the same material is spread among different authors risks inadvertent inconsistency. The careful reader might wonder whether overlapping statements on currency fluctuation⁹ and time limitations¹⁰ are reconcilable. The

New York Convention prohibits attachment), with *Carolina Power & Light v. Uranex*, 451 F.Supp. 1044 (N.D. Cal. 1977) (permitting attachment).

⁶ In *Cooper v. Ateliers de la Motobecane*, a dispute between a French and an American corporation, to be arbitrated in Zurich, was tied up in New York courts for several years in deciding whether conditions precedent to arbitration had been met and whether a prejudgment attachment was available. See 49 N.Y.2d 741, 404 N.E.2d 741, 427 N.Y.S.2d 619 (1980), and 57 N.Y.2d 408, 442 N.E.2d 1239, 456 N.Y.S.2d 728 (1982).

⁷ For a recent discussion of federal preemption in arbitration, see Loumiet's Introductory Note to the Florida International Arbitration Act, 26 ILM 949 (1987).

⁸ For example, interest (pp. 28, 155), currency fluctuations (pp. 29, 129) and time bars (pp. 33, 48) are all treated twice.

⁹ On page 29, we find the statement, "Unless otherwise specified, U.S. courts convert awards made in foreign currency into dollars at the exchange rates prevailing on the date of entry of judgment when the obligation is performable in a foreign country." However, on page 129, different authors state that the "judgment day rule" is applied if foreign law governs. Is the reader to take these two statements as being consistent when the obligation to be performed abroad has been subjected to U.S. law by the parties' explicit choice?

¹⁰ On page 38, the authors state that New York law requires courts to compel arbitration if the claim is not barred by the New York state statute of limitations. A different author writes (p. 48) that the New York state statute of limitations will *not* apply to international arbitrations. The reader is left to wonder why the first author omitted telling us that his statement was irrelevant to the book's topic.

next edition might note that the effect of bankruptcy on arbitration is becoming more complicated; several recent cases have permitted international arbitrations to proceed despite the automatic stay provided for by the Bankruptcy Code.

McClendon's description of commencement and administration of arbitration includes discussion of institutional rules and appointment of arbitrators. Of the issues that may arise at the commencement of arbitration (pp. 47-54), at least two are worth exploring in greater detail: What does it mean for an agreement to be "inoperative"? At what point does participation in litigation constitute waiver of the right to arbitrate?

The selection of an arbitrator is often the most critical single decision by a party. Themes related to the arbitrators themselves are developed in the thorough and scholarly contribution by Hoellering. In a follow-up article, Hoellering might examine in greater depth issues related to the arbitrator's ethics and independence. When—if at all—may parties talk to an arbitrator outside the proceedings? About what? May an arbitrator be nominated by the same party in several arbitrations? Hoellering might also devote more attention to the national balance of the arbitral tribunal, and the degree of confidence in transnational arbitration by nationals of countries whose elites are not integrated into the emerging caste of professional arbitrators.

Foreign fears of American-style discovery account for much of the reluctance to choose New York as an arbitral situs. This concern is explored in the well-researched chapter on procedure, where Stein and Wotman extensively document the proposition that courts in New York will ordinarily deny requests for discovery. However, not all peculiarities of American procedure can be avoided. The authors note that the right to cross-examine witnesses (on which the continental and the Anglo-American approaches diverge) is deemed an essential element to a fair hearing, and thus prevents arbitrators from adopting an entirely inquisitorial system. In the same chapter on procedure, Newman and Nelson further explore judicial assistance to the arbitral process. They provide a thorough examination of consolidation of multiparty arbitration and an excellent section on measures of interim protection such as attachment. Care is taken to point out differences between state and federal statutes, divisions among the federal circuits and the interaction of statutory and institutional rules.

The unsigned chapter on applicable substantive law draws a rather extreme conclusion about choice of law: that the right to choose an arbitral forum implies the parties' right to choose "any substantive law they wish" (p. 117). However, dicta by the Supreme Court in *Mitsubishi* (discussed on the same page as the above assertion) stressed that national law may limit the parties' choice when public interests are involved. In holding antitrust matters arbitrable in an international dispute, the Court warned that it would condemn, as against public policy, a choice-of-law clause that operated as a "prospective waiver" of the right to pursue statutory claims.¹¹

¹¹ See *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 n.19 (1985).

Increasingly, arbitrators face a double bind: whether to give effect to the will of the parties, or to protect the reputation of the arbitral process by refusing to let it be used to evade the mandatory norms of a country with a vital interest in the subject matter of the dispute. The parties' choice-of-law clause may well be ineffective when it would operate to avoid imperative rules of the place of performance—often called *lois de police*—such as competition law, currency controls, and boycott, environmental protection and bribery regulations.¹² In applying these norms, the arbitrator does not serve as an officer of the court; rather, he acts to maximize the award's effectiveness by exhibiting sensitivity to the vital national interests of the place of enforcement.

Parties obtaining awards in New York will want to know whether the award will be recognized abroad where the loser has assets. The book has two excellent chapters to help practitioners ensure that such awards will be enforceable. McLaughlin, Brill and Rostow provide a thorough summary of procedures for review, confirmation and *vacatur* of awards. Unfortunately, the section on judicial challenge to awards blurs the important distinction between vacating an award and refusal to confirm.¹³ The scholarly chapter by Layton and Sherman continues to develop themes related to confirmation and enforcement of the award, including special considerations regarding enforcement against a foreign state.

* * * *

The reviewer's major disappointment with the book is that public policy issues were not refracted through the practitioners' eyes. The book's narrow perspective pays little attention to the social and commercial implications of transnational arbitration. The essays pass without comment over the policy implications of matters such as currency fluctuations,¹⁴ interest,¹⁵ punitive damages¹⁶ and reasoned awards,¹⁷ and provide little analysis of the

¹² See Mayer, *Mandatory Rules of Law in International Arbitration*, 2 ARB. INT'L 274 (1986).

¹³ The section entitled "Grounds for Vacating Awards" (pp. 136–47) deals with challenge to awards rendered in the United States by referring to New York Convention defenses to enforcement of foreign awards. Although these treaty defenses constitute grounds for withholding confirmation of awards rendered locally, *vacatur* of an award has a broader effect under Article V(1)(e) of the New York Convention than does refusal to confirm. *Vacatur* permits refusal to enforce the award abroad. The distinction is not always clear when courts deal simultaneously with actions to vacate and to confirm arbitration awards. See *Northrop v. Triad*, 811 F.2d 1265 (9th Cir. 1987).

¹⁴ The judgment date rule (mentioned on pp. 29 and 129) can be harsh on creditors when there has been a depreciation of currency between the breach of contract and the award.

¹⁵ New York's statutory interest rate (mentioned on pp. 28 and 155) seems less neutral, and thus less just, than the market rate.

¹⁶ The holding of *Garrity v. Lyle Stuart*, that punitive damages are reserved for courts (discussed at pp. 127–28), opens the door to the multiple adjudication and judicial proceedings that the parties expected to avoid by arbitration. The 11th Circuit has held *contra* in a case involving the U.S. Arbitration Act. See *Willoughby v. Kajima Int'l*, 776 F.2d 269 (11th Cir. 1985), *aff'd* 598 F.Supp. 353 (N.D. Ala. 1984).

¹⁷ It is stated (p. 29) that though customary in international arbitration, awards that include reasons are not the general practice in the United States. The reader might want to know whether this is good or bad. Reasoned awards make heightened demands on the intellectual

justification for international arbitration's privileged legal status, by virtue of which rules applied to domestic disputes are often rejected in the international arena.

International commercial arbitration provides a neutral playing field on which transnational economic law is enforced. Its role in the process of creating global wealth is justified by neither speed nor cost, but rather primarily as a means of avoiding the "hometown justice" of the other party's judicial system. In a purely domestic context, an unenforceable arbitration clause may result in a trial in Philadelphia rather than an arbitration in New York. In an international context, the alternative judicial proceedings may be in a foreign language before a hostile judge of a country where political influence makes a fair trial problematic.

This special need for neutrality has led to application of different rules to domestic and international arbitration in matters such as subject matter arbitrability¹⁸ and confirmation of awards.¹⁹ The reader can legitimately ask how this privileged status affects larger societal interests, and whether it should be extended. Particularly interesting would have been an evaluation of the appropriate limits of national judicial meddling with the arbitration. One might argue that in international arbitration, the scope of judicial review of awards should be narrower than in domestic cases.

Understanding the genesis, evolution and justification of a rule facilitates a grasp of its operation. A glimpse at the policy context of international arbitration's special legal status would help the reader to grapple more effectively with the description of cases and statutes. The study of rules without consideration of their policy underpinnings may create a type of "voodoo jurisprudence,"²⁰ in which words are assumed to have power to change behavior regardless of their impact on society and the enforcement mechanism on which they depend.

A proper mix of the analytic and the descriptive is admittedly difficult. Yet the quality of objective intellectual curiosity that American lawyers would like to project abroad includes concern for how law affects both the participants in the arbitral process and the communities in which the participants operate.

Finally, the book would be more geared to its audience if it contained a comparative dimension,²¹ giving the reader an idea of what makes New York a better (or worse) place to arbitrate than Geneva, London or Paris.

rigor and integrity of the arbitral process. They also stimulate the development of a *lex mercatoria* in which awards become part of an objective corpus of international arbitral case law. On the other hand, reasons may serve as dangerous invitations to judicial annulment of the award, where a losing party is seeking a peg on which to hang a challenge to the award.

¹⁸ See *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (antitrust); and *Scherk v. Alberto-Culver*, 471 U.S. 506 (1974) (securities regulation).

¹⁹ See 9 U.S.C. §207 (1982) (providing a 3-year statute of limitations for confirmation of awards in international disputes, as opposed to 1 year in domestic cases).

²⁰ See W. M. Reisman's review of installment 7 of the *Encyclopedia of Public International Law*, 81 AJIL 263, 269 (1987).

²¹ For example, in discussing laches on page 53, reference might have been made to the abundant English law on time bars and court sanctions imposed on dilatory parties. See, e.g., M. MUSTILL & S. BOYD, *COMMERCIAL ARBITRATION* 130, 159-87 and 433-34 (1982).

Flat descriptions of state and federal law are only partially responsive to the World Arbitration Institute's self-asserted purpose of showing that New York is "a good place to arbitrate an international dispute" (p. xi).

II. A BRITISH PERSPECTIVE

Alan Redfern and Martin Hunter have produced the best general treatment of trends in international commercial arbitration yet to be published in English. Their beautifully written and solidly structured *vade mecum* is a pleasure to read, and should be part of the library of every international lawyer. These two London lawyers do more than address practitioners about how to serve clients. They also provide teachers with a useful pedagogical tool, and give scholars an erudite and learned analysis of the evolution of international arbitration.²² Practical advice is married with doctrinal analysis in a well laid-out map of the rules, laws and practices through which lawyers must navigate in commercial arbitrations containing an international element.

The complex interface of treaty, statute and arbitration rules (both institutional and ad hoc) unfolds without giving any one legal system or set of rules so much detail as to be tedious. The laws of several countries illustrate each topic, but without an overambitious attempt at a systematic or comprehensive contrast of historical peculiarities.

The first-rate introduction presents a topographical survey of the legal playing field for transnational arbitration, and carefully distinguishes the functions of three principal legal systems: the law applied to the merits of the dispute, the law governing the arbitration itself, and the law(s) affecting the recognition and enforcement of the arbitration agreement and award. A fourth legal system, it might have been added, comes into play when arbitrators subject procedural matters such as evidence to a particular national law. The reader is reminded of the differences between agreements to arbitrate future disputes and agreements to arbitrate existing quarrels. Useful definitions are suggested for "international" and "commercial" as applied to arbitration.

The disadvantages of arbitration include delay due to inadequate power to discipline recalcitrant parties, and expense from the arbitrator's fees and administrative costs. These defects are noted, and the reader is mercifully spared the silly marketing hype found in many books on arbitration. Logic and experience are combined to explore theories relating to the *lex arbitri*, the law governing the arbitration itself. Responding to suggestions that arbitration be detached from the law of the place of the proceedings, Redfern and Hunter describe the fashion for "a-national," "delocalized" or

²² Notable examples of their academic bent include speculation that the origins of the "de-localisation theory," which would cut arbitration loose from the law of the place of the proceedings, lie in the state immunity doctrine announced in the 1958 *Aramco* award (p. 58). Historical material is provided on the 1923 Geneva Protocol, the 1928 Bustamante Code and the background (from 1899) of the role of the United Nations in arbitration. Ironically, one of the co-authors has on occasion complained about the academic approach to the study of international commercial arbitration. See Hunter, Book Review, 51 ARBITRATION 290, 293 (1985).

"floating" arbitration (pp. 55-60) in a learned chapter that compares the "delocalization" doctrine with the theory that an arbitration is controlled by the law of its territorial seat.²³

Conceding the "understandable desire for uniformity in the regulation of international commercial arbitration" (p. 56), the authors insist that to make arbitration independent of the law of its seat would "attach too much significance to the wishes of the parties and not enough to the framework of national laws within which [the arbitration] must take place" (p. 98). The authors' sophisticated and nuanced analysis of the *lex arbitri* takes into account the viewpoints of both claimant and defendant, and gives local law more than a grudging tolerance as a necessary evil in ensuring the award's enforceability.²⁴ Unlike commentators who focus solely on the winner's concerns—finality and speed—the authors also acknowledge the potential loser's interest in a fair consideration of all issues.

The authors' enthusiasm for the "seat theory" may be excessive when they suggest that an award, to be enforceable, must absorb the nationality of the state where the arbitration takes place (pp. 57-58 and 64). Although the New York Convention allows a state to refuse to enforce awards that do not conform to the law of the place of arbitration, this denial of recognition is permissive, not mandatory.²⁵ And the 1961 European Arbitration Convention permits refusal of recognition of an award set aside where made only if annulment was for one of the reasons specified in the Convention.

Teasing questions about the interplay of different legal systems make the treatise an intellectual delight. The chapter on beginning an arbitration mentions the conflict that arises when the proper law of the contract and the law of the place of arbitration impose different time limits for bringing a claim (p. 149). The authors admit to honest agnosticism on such issues, which they put into a box awaiting further light.

Outlining professional standards for arbitrators, the authors rightly note the need for "experience" (p. 196). They might also have noted that experience can have unfortunate dimensions when large fees exert too much influence on professional arbitrators. Some arbitrators may be so eager for new appointments that they relax rigor and integrity; a junior arbitrator

²³ Much ink has been spilled in the debate on whether international arbitration should be set free from procedural norms of the place of the arbitral seat. For a summary of the discussion on "floating awards" and "drifting arbitration," see Park, *Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21 (1983); and the reply by Paulsson, *Wings of Silence*, *id.* at 53.

²⁴ Cf. Craig, *International Arbitration and National Constraints in I.C.C. Arbitration*, 1 ARB. INT'L 49 (1985).

²⁵ The English version of Article V(1) of the Convention states that an award "may" be refused recognition and enforcement if set aside under the law of the place where rendered. Theoretically, national courts of a party to the Convention could enforce an annulled award, although this does not happen in practice. The equally authoritative French text is more ambiguous: "La reconnaissance et l'exécution de la sentence ne seront refusées . . . que si . . . la sentence a été annulée ou suspendue . . ." (Recognition and enforcement will not be refused . . . unless . . . the award was annulled or suspended).

may defer to a more senior member of the international arbitration mafia in the hope of being recommended in another case.

The authors show considerable conceptual precision in their detailed analysis of the ethical qualifications of arbitrators. The domestic practice of expecting an arbitrator to be an advocate for his nominating party is contrasted with the international custom of more neutrality. Although not all of the authors' nuances are easy to follow, helpful distinctions are made among "independence," "impartiality" and "neutrality" (pp. 171-72). An arbitrator is "non-neutral" if he sees himself as an advocate; he lacks "independence" if he has a direct financial interest in the outcome; and he is "partial" if his beliefs and convictions predispose him toward a particular outcome. In an international commercial dispute, an arbitrator should always be financially and professionally independent, and he is expected to be less of an advocate, and thus more neutral, than in a domestic arbitration. Some developing countries nevertheless nominate employees or consultants of state agencies as their arbitrators.

Minds new to a subject grasp concrete examples more readily than abstract generalities. Therefore, students will benefit from the detailed presentation of the facts of vital awards and cases such as *Aramco*, *Texaco* and *E.P.P.* (pp. 58-59 and 328-33). The excellent index, outline and tables of cases and awards conspire to make this treatise a good companion to any set of teaching materials. Six appendixes provide the UNCITRAL Model Law, the UNCITRAL Rules, the IBA Rules of Evidence, the New York Convention, an ad hoc ("one-off") arbitration clause and a submission agreement.

The reviewer's enthusiasm abated in the chapter on the role of the United Nations in sponsoring treaties, laws and rules. The book would be worth its price even without these somewhat superfluous 45 pages. The material might have been integrated elsewhere, and the space saved devoted to more on the drafting of terms of reference.

Many good one-liners attest to the authors' humor and culture. Some common law jurists are unfamiliar with *amiable composition* (decision according to fairness rather than law), a two-edged sword that may substantially reduce the loser's opportunity to challenge an award. To illustrate the Anglo-American experience gap, the authors tell of an English lawyer who knew a little French, and thought that an *amiable compositeur* was a "friendly printer." The section on arbitrability contains a derivative reference to Baron von Münchhausen's pigtail.

Occasionally, broad assertions beg for specific supporting authority. A statement that the word "controversies" in an arbitration clause has been held in the United States to have "the widest possible meaning" (p. 116) is unsubstantiated.²⁶ The announcement that "in most jurisdictions" the arbitrators have no inherent power to strike a claim by reason of dilatory conduct (pp. 136-37) is supported only by reference to English and Hong Kong law.

²⁶ Reference might have been made to the cases cited in *S.A. Mineracao Da Trindade-Sami-En v. Utah Int'l*, 745 F.2d 190 (2d Cir. 1984).

Certain controversial subjects need more critical discussion. In particular, the procedural aspects of the Third World's "New International Economic Order" (pp. 81-84) pose more problems than the book suggests. The Charter of Economic Rights and Duties of States would remove investment disputes from the jurisdiction of international arbitration in favor of host state tribunals. To permit compensation for nationalized assets to be determined solely by the host state would permit one party in a dispute to decide its own case, and reduce the stability and security necessary for foreign private investment.

These quibbles, however, are minor. With grace, elegance and style, Redfern and Hunter have written a superb general treatise on how arbitration law affects international dispute resolution.

III. A FRENCH LOOK AT AMERICAN PROCEDURE

Patrick Thieffry and Christine Lecuyer-Thieffry approach both arbitration and litigation in a single volume. This intriguing Gallic contribution to the literature on international dispute resolution covers a broad range, examining, first, rules of American civil procedure, and then the recognition and enforcement of foreign judgments and awards in the United States.

The title, translated as "Resolution of Civil and Commercial Disputes with the United States," may lead the reader to expect more analogies and contrasts than the book delivers. It is intended to give the Francophonic reader an awareness of concepts, cases and statutes relating to American jurisdiction and judgments. The reader may be stimulated to think about similarities and differences between the parallel adjudicatory processes of arbitration and litigation; but he will have to draw his own conclusions.

The authors begin with a "preliminary chapter" outlining differences between French and American business law (such as consideration, frustration and the trust), jurisdictional principles and arbitration law. The book thereafter divides into two parts. The first summarizes basic rules of American civil procedure, with chapters on jurisdiction, hearings and judgments. The second part sketches American principles related to foreign judgments (including reference to the Uniform Foreign Money Judgment Recognition Act and the *Restatement (Second) of Conflict of Laws*) and recognition and enforcement of arbitral awards.

A useful table indicates bilateral Franco-American treaties and certain multilateral conventions ratified by the United States. Seven appendixes set forth, in English, American statutes and arbitral rules. These omit the Rules of the International Chamber of Commerce, perhaps because the French reader will have them available. It should be noted, however, that Franco-American controversies are as likely to be dealt with under the Rules of the International Chamber of Commerce as under the Rules of the more domestically oriented American Arbitration Association.

Another curious gap (p. 43) is any serious analysis of the French procedural peculiarities that affect Franco-American disputes. The "exorbitant" jurisdictional provisions of Articles 14 and 15 of the French *Code civil* grant French courts competence over disputes merely on the basis of the French

nationality of the plaintiff or the defendant. Although these rules may be abrogated by contract (including a choice-of-forum clause), their competing jurisdiction will influence resolution of disputes between businesses in Paris and New York, particularly when Americans forget them at the time of contract negotiations.

The 10 pages devoted to recourse against awards under chapter I of the Federal Arbitration Act should be expanded. A Pandora's box is opened when courts attempt to draw a fine line between a normally unreviewable legal error of an arbitrator and his deliberate or inadvertent refusal to apply the chosen law. "Excess of authority" and "manifest disregard of law" are slippery concepts by which courts deal with a fundamental disaccord between how the arbitrator was authorized to decide and how he in fact did decide.

Dissenting opinions, not permitted in French courts, are an important difference between continental and Anglo-American procedure and might have been studied in a comparative book. Continental arbitrators are sometimes surprised when Anglo-American colleagues insist on memorializing their reasons for refusing to join the majority. The value of a dissenting opinion as a stimulus to rigorous legal reasoning must be weighed against its potential abuse by a minority arbitrator to impair the enforceability of an award.

The authors suggest that American civil procedure should be avoided, if possible, because of its complexity (p. 169). The advantages and disadvantages of the proposed alternative—arbitration—beg more focused analysis than the book provides. What the authors call the "permeability of the American territory" on international arbitration raises the question *how* American litigation differs from arbitration.²⁷ Rigorous comparison of these competing adjudicatory mechanisms could provide insight into the way the commercial community's values and goals are reflected in the application of arbitration treaties and statutes. Perhaps the adage that parties are presumed to know the law should not apply to the same extent in arbitration as in litigation. The search for a neutral forum may override the goal of legal predictability. A comparison might also give to the practical-minded some guidance on the merits of competing tactics and strategies for compelling production of documents in arbitration and litigation.

International and domestic adjudication are disparate beasts. The opposing sides of a controverted international transaction usually seek a political and procedural neutrality that is problematic in a national court. Thus it would be interesting to explore which procedural safeguards of American law French businessmen expect to obtain, and which they hope to avoid, when arbitrating in the United States. Are cross-examination and discovery bargained for in the same way as the right to have awards vacated for arbitrator misconduct?

²⁷ The authors' "permeability" notion (p. 169) may not be entirely consistent with their statement (p. 172) that "arbitration . . . can be detached from any context of state sovereignty" (*l'arbitrage . . . peut être détaché de tout lieu de souveraineté*).

The book's topic might also be a springboard for contrasting the relative expense and speed of transnational adjudication with its domestic counterparts. Perhaps the American Arbitration Association provides quicker and cheaper decisions than are available under federal appellate procedure. Can the same be said of arbitration in Europe when compared with local courts? In some countries, a right to judicial recourse against an award on its legal merits may substantially delay arbitration.

The reviewer's temptation to ask why the authors wrote a different book from the one he would have written should not obscure the value of the work. Although readers would have benefited from more comparisons between arbitration and litigation, and between French and American procedure, the manual performs a useful service in introducing French lawyers to the complexities of adjudication of disputes with Americans.

IV. THE CONSTRAINTS OF NATIONAL LEGAL SYSTEMS

Sound Policy or Just a Nuisance?

The books under review all deal with how national legal régimes influence an adjudicatory process intended to avoid national courts. The powers of an arbitrator, as Redfern and Hunter note, arise from a "complex amalgam of the will of the parties, the law of the place of arbitration and the law of the place where recognition or enforcement of the award may be sought" (p. 209). Whether the last two components of this amalgam are imperatives of sound policy, or merely a nuisance to the arbitrator, is open to debate. Paradoxically, court intervention in arbitration results from the business community's wish that agreements to renounce recourse to courts should be binding. When the disappointed loser of an arbitration resists enforcement of the award, or when one party wavers in its willingness to go forward with proceedings as agreed, courts that enforce the agreement or award inescapably impose some measure of their own national law.

The practitioner will pay attention to national legal systems principally to maximize the award's enforceability, or to increase the scope of judicial review if his client expects to lose. The legislator and the student of policy, however, will ask deeper questions about the intersection of national law and international arbitration.

Ensuring respect for the consensual nature of arbitration occasions much of the interface between judge and arbitrator. A legal system will not normally support an arbitrator who decides the dispute differently from the way the parties agreed he should. When protecting parties from overreaching arbitrators, however, courts may also look after the interest of those who are not party to the arbitration agreement, including the public.

Countries that act in the arbitral process will want to protect three types of interests: societal welfare affected by the content of the award; parties' rights affected by an arbitrator's unfairness or excess of authority; and the evolution of a country's substantive law, which may stagnate if courts are not fertilized with disputes about new problems. Thus, courts have historically restricted private adjudication of "nonarbitrable" subjects that implicate

vital public interests. Courts may refuse to enforce arbitration agreements or awards that contravene imperative substantive norms related to matters such as free commercial competition.²⁸ Courts will also ask whether the arbitrator has respected the procedure the parties bargained for and whether the arbitration has infringed nonwaivable due process rights. These rights may be of more limited scope in international arbitration than in domestic litigation. For example, in New York, cross-examination, but not discovery, is considered an essential element of a fair arbitration hearing. And to further development of local law, some categories of arbitration may be subject to a mandatory right of appeal. In England, for example, predispute exclusion of appeal is not possible with respect to disputes governed by English law in the commodities, shipping and insurance areas, where English law has long been preeminent.

International businessmen resort to arbitration above all for its neutrality, both political and procedural. Neutrality means, first, the avoidance of "hometown justice": judicial xenophobia or hostile interference by the opposing side's government. Neutrality also means a minimum of procedural idiosyncrasy. Cross-examination may appear non-neutral to continental businessmen even if the judge is fair. The prospect of American-style discovery probably increases, rather than diminishes, the Frenchman's sense of uncertainty.

Ironically, ensuring the political neutrality of a non-national forum complicates the realization of procedural neutrality. Judicial enforcement of arbitration agreements and awards insinuates into the arbitral process an element of a national legal system that the parties intended to avoid. When the U.S. Supreme Court compelled arbitration of the now famous dispute between Mitsubishi and one of its American distributors, the Court insisted that the distributor's antitrust counterclaim be considered under the Sherman Act, despite the Swiss choice-of-law clause in the contract. Judicial support of arbitration against recalcitrant parties gives businessmen the bargained-for non-national forum at the expense of interjecting some of the peculiarities of the enforcement system.

Of the several legal orders on which the bindingness of international arbitration depends, the role of the arbitral seat is the most frequently questioned. This is also the legal system that can most easily be manipulated by the contracting parties (or the supervisory arbitral institution) when they select the situs of the arbitration.

The understandable desire to further a more uniform system of international dispute resolution tempts one to ask whether arbitration should not be detached from the law of its situs. This attractive concept of delocalized arbitration would seem to promote the wishes of the parties without necessarily violating the vital interests of the arbitral seat, which, in a transnational dispute, rarely coincides with the parties' citizenship or residence.

²⁸ See the "prospective waiver" and "second look" doctrines announced in *Mitsubishi*, 473 U.S. at 637 n.19.

The arbitration usually will have its economic or social impact outside the borders of the place of the proceedings. Only if local substantive law applies to the merits of the dispute will the arbitration affect the country of the proceedings, and this only tangentially in its removal from courts of disputes that otherwise might have fertilized the evolution of local law.

It would be misguided, however, to eliminate all scrutiny of the award by courts at the seat of the arbitration. Unless a defective award is subject to challenge where rendered, at least for violation of minimum standards of procedural fairness, the loser might unfairly be forced to defend against enforcement wherever it has assets. In particular, a person that never signed the arbitration agreement—for example, a corporation or a country joined to the arbitration merely because of its relationship to the other defendant—should have a chance to litigate the arbitrator's jurisdiction at the time of the award. A country that assists arbitration indirectly by allowing the proceedings to go forward should control the fairness of the process. The very fact that an award is rendered within the territory of a signatory to the New York Convention gives the award presumptive validity before the courts of all other states adhering to the Convention. As Redfern and Hunter note, "it would be unusual for a state to lend its support to arbitral tribunals operating within its jurisdiction without [attempting] to ensure that certain minimum standards of justice are met, particularly in procedural matters" (pp. 42-43).

The wishes of the parties themselves are not always served by arbitral autonomy. Whether a national legal framework can be called favorable to arbitration depends in large part on whether one is a potential winner or loser. The party that expects to win will look for speed, economy and finality. The party that fears losing because its arguments are not self-evident looks for judicial review, to ensure that all aspects of the case have been fairly considered. No national legal system is likely to reconcile satisfactorily the inconsistent aims of both winner and loser, claimant and defendant.

The Limits of Arbitral Autonomy

The arbitrator in a transnational dispute must look over his shoulder at national norms imposed by the parties' residence, the seat of the arbitration and the locus of the loser's assets. Not only must he be attentive to more than one legal system, but he must juggle dictates that are not always consistent. Application of the parties' chosen law may lead to an unenforceable award if it violates the public policy of the country of performance. But an arbitrator who ignores the parties' choice of law, in order to respect mandatory norms of the country of performance, may invite challenge at the place of arbitration for excess of authority.

The extent of the arbitrator's dilemma in navigating among legal mandates of several countries might be illustrated by a fictional story about a joint venture to market foreign minerals in the United States. Through one of its thinly capitalized subsidiaries, an American enterprise contracted with

a foreign state agency to purchase minerals for 20 years at a fixed price. The parties agreed that any dispute "relating to the interpretation of the contract" would be decided according to "principles of English law," and that all disputes "arising out of the contract" would be settled by arbitration in Ruritania under the Rules of the International Chamber of Commerce.

The sale of the minerals in the United States was embargoed, and the profitability of the venture put into doubt. Considering that the trade sanctions constituted *force majeure*, the Americans terminated the contract. The state agency insisted that the minerals be sold in Europe, and commenced arbitration against the doubtfully capitalized subsidiary (which quickly slipped into bankruptcy) and also against its parent. The American defendants assert that the arbitral tribunal is incompetent because the parent never signed the arbitration agreement and because the Bankruptcy Code provides an automatic stay of proceedings against the subsidiary. Consider how the arbitrator must sail precariously through the straits of inconsistent legal systems on the following issues:

(1) The Ruritanian court reviewing an interim award on the arbitrators' jurisdiction may refuse to stop the arbitration against the subsidiary even if it has been enjoined by an American judge.

(2) Whether the parent corporation can be joined to the arbitration on an *alter ego* theory could be subject to inconsistent decisions in a Ruritanian court and by an American judge ultimately called on to enforce the award.

(3) A Ruritanian court might uphold appointment of an arbitrator (challenged for improper links with one of the parties) although an American court could later refuse to enforce the award because the arbitrator lacked the independence required by the party-selected arbitral rules.

(4) If the arbitrators apply English law only to "interpretation" of the contract, but not to the quantum of damages, the award may be annulled in Ruritania for excess of authority. Thereafter, jurisdictions where the loser has assets will not be obliged to enforce the award. But American courts may refuse enforcement if the arbitrators do not consider American public policy.²⁹

(5) The defendants may bring an action for damages against the arbitrators for allowing the arbitration against the parent.

(6) The award's *res judicata* effect may be tested under the law in the claimant's home country, which forbids state agencies to submit future disputes to arbitration.

(7) Public international law principles of sovereign immunity of any country where the state agency has assets will arise if the arbitrators accept an American counterclaim.

²⁹ The first part of Article V of the New York Convention provides that an award annulled where rendered may be refused recognition abroad. Under the second part of Article V, a country may refuse enforcement of a foreign award that violates its public policy.

The arbitrator's bind is all the more poignant because the timing of judicial intervention does not necessarily correspond to the relevant stages of the arbitration. American power exercised at the award stage may inhibit arbitrators during hearings. Or American courts may refuse to compel the defendant to participate in the arbitration at its commencement because the law that will later govern the merits of the dispute operates as a "prospective waiver" of mandatory norms of the performance.

* * * *

Professor René David has defined arbitration as dispute resolution in which a private agreement, not state power, invests the decision maker with authority.³⁰ While eminently correct in emphasis, the definition needs completion with the observation that state power gives arbitration its binding character. By allowing an award to be made within its territory, the seat of the arbitration gives the award an "international currency" that facilitates enforcement against assets found in jurisdictions that adhere to the New York Convention.

Review of awards by the seat of the arbitration takes forms so diverse as to defy taxonomy. However, almost all forms of review derive from a sense of national responsibility to control the integrity of a process that receives state support. A nation that gives the arbitrator power to bring about legal consequences takes upon itself an obligation to ensure respect for the limits imposed on the arbitrator's authority and for fundamental procedural rights. The winner's interest in finality, privacy and economy must be weighed against the loser's concern for a fair proceeding.

No national legal system is likely to resolve all these tensions between judge and arbitrator, or between winners and losers. However, the books under review should contribute to a dialogue among practitioners and policymakers that will advance understanding, and perhaps partial accommodation, of national interests and the arbitrator's impulse toward autonomy.

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The Concept of International Law. By Ingrid Detter De Lupis. Stockholm: Norstedts Förlag, 1987. Pp. 145.

Right from the time that Jeremy Bentham coined the term "International Law" to refer to the law of nations, every theoretical formulation of the basis and essence of that law has been open to challenge. Austinian positivists questioned the validity of the term "law" as applied to the law of nations. The monists and dualists debated whether international law and municipal law are integral parts of the same legal order. More recently, the debate

³⁰ R. DAVID, *L'ARBITRAGE DANS LE COMMERCE INTERNATIONAL* 9 (1982).

seems to have shifted to the twin issues of what entities may be properly considered subjects of international law and whether the principle of the universality of international law would permit regional derogations from certain of its norms. Throughout these debates the only point on which scholars seem to agree is that modern international law is the product of Christian civilization and that it was originally conceived as a set of rules designed to govern the conduct of the Christian states of Western Europe.

All existing theories of international law, when judged in terms of their ideological orientation, tend to fall into three general groups: traditional Western, belligerent socialist¹ and dissident Third World. Now, for the first time in the history of modern international law, we have a new theory that apparently sheds all ideological constraints and seeks to capture the true character of the changing law of nations in all its complexities. Professor Ingrid Detter De Lupis has produced a richly textured book on the theory of modern international law. It is deeply pondered and scrupulously researched. It is a compelling, mind-expanding account of how rules of international law are created. It posits a revealing theory of the foundations of international legal obligations. It paints a fresh and infinitely more complex portrait of international law than we have previously seen.

What is particularly interesting about De Lupis's theory is that many of its key elements are bound to appeal to both socialist and Third World nations. For example, her idea that regional and universal international laws constitute two coexistent concentric circles is particularly appealing to apologists of the socialist theory of international law.² Her notion that international customary law is an exaggerated fallacy fits well with the political agenda of the Third World nations.

There are four components to De Lupis's theory. The first reformulates the norm-creating process in international law. The second rethinks the basis of international legal obligations. The third debunks the notion of international customary law. The fourth constructs a new taxonomic model for international legal rules. I regard the first three elements as the core of her thesis. The thrust of the book is captured in a single, isolated, declarative sentence: "However, at present there is some uncertainty as to the present state of international law and it has become increasingly noticed that the theory itself of international law is in a state of anarchy" (p. 17).

The author attributes this anarchy to the fact that proponents of the competing schools of thought—the normativists and the social process adherents—seem to be talking at each other rather than with each other. In

¹ The socialist theory of international law is essentially a "fighting" rather than a "thinking" theory. A representative sample may be found in G. TUNKIN, *THEORY OF INTERNATIONAL LAW* (W. Butler trans. [with an introduction] 1974).

² For a discussion of the Soviet perspective on the parallel existence of socialist international law and general international law, see Osakwe, *Socialist International Law Revisited*, 66 *AJIL* 596 (1972); Hazard, *Renewed Emphasis upon a Socialist International Law*, 65 *id.* at 142 (1971); W. Butler, "Socialist International Law" or "Socialist Principles of International Relations"?, *id.* at 796.

her view, the social process school dispenses with the debate over who may be the proper subjects of international law, but provides little guidance on the normative value of the international legal system. On the other hand, she thinks that the normativists provide few guidelines on the participation of nonstates in the international arena. In her words, "the social process school now appears to lack normativity and the normative school to lack universality" (p. 19). The author views herself as a normativist of sorts, but regards her brand of normativism as not incompatible with social process theory. In her words, "international law is not a process but a normative system laying down rules and obligations. But this normative system may be created and continuously revised by a process in the way the social process school suggests. And the normative system may be more dynamic than the additional normativists contend" (p. 17).

The author challenges the validity of some of the entrenched institutions of all modern theories of international law. She thinks, for example, that existing theories of international law tend to equate subjects of international law with the creators of that law. In her view, there are clear distinctions among actors, persons and creators. Creators make the law, actors act under it, and legal persons are given rights and duties under the system. All three categories are bound by international law. As such, they are all latent subjects of international law. They are active subjects insofar as they all enjoy certain direct rights under international law. All subjects are potential actors. But it is only when they presume to act in a way relevant to the international sphere that they become actors (p. 129).

The author then goes on to challenge the conventional theory of obligations in international law. She rejects both the "consent theory" and the *grundnorm* approach as absurd (p. 121). She finds some merit in the theories of social obligation as developed by Scelle, but concludes that these are equally wanting. Rather, she opines that the basis of obligation in international law varies according to the nature of the rule. She devises a tripartite formula by which an international rule is binding by virtue of either logical necessity or social necessity or consent (pp. 122-23). In her view, the inherent maxims of international law (such as *pacta sunt servanda*, *nemo debet esse iudex in propria causa* and *res judicata*) are binding by virtue of logical necessity. On the other hand, prophylactic rules (such as those concerning prohibition of the use of force) are binding by virtue of social necessity. She does concede, however, that consent is the most common basis for obligation in the international society (p. 123).

The author saves her strongest criticism for what she calls the fallacies of customary law. She regards the psychological element of *opinio juris* as nebulous (p. 112). She dubs Cheng's paradoxical concept of instant customary law as an unacceptable contradiction in terms (pp. 112-13). In her view, all modern writers on international law exaggerate the role of custom (p. 115). It is her contention that outside the realm of territorial claims by prescription, customary law has no foundation or justification in modern public international law (p. 116).

Perhaps the author's most innovative idea is her "theory of interactivism" in which she explains the formulation of new rules of international law. She believes that international legal rules are brought about as a result of the legal acts of the members of the international society (p. 87). She further asserts that for a rule to flow from an act, the act must be internationally relevant and the actor must be competent to act (p. 116). She cautions, however, that even though all norms in the international society are the product and result of legal acts, not all acts create norms. In her words, rules are "usually produced by the juxtaposition of complex acts of varying type and form in converging patterns. The essence of this mechanism of interactivism is that participating acts are all individually relevant in the international society but it is together that they are capable of producing norms of behavior" (p. 88).

Ancillary to her thesis is a new theory on the taxonomy of international legal rules. In her view, rules of international society can be classified in a hierarchical order according to their immediate linkage to a hypothetical goal of international law. Using this criterion, De Lupis comes up with the following categories of rules: intrinsic, entrenching and supplementing. Intrinsic rules are subdivided into inherent maxims and general principles. By contrast, entrenching rules are broken down into prophylactic and stabilizing rules. Within the category of supplementing rules, she includes promotional and consequential rules.

Thoughtful as this book may be, it is not without blemish. Some of the good ideas put forward by the author are left hanging in thin air. For example, absent further clarification, one is at a loss to understand the author's reasons for drawing a distinction between "fundamental human rights" (which she fails to define) and "socioeconomic rights" in her formula for determining the spheres of operation between general and particular international law. She thinks that international law rules regarding the former group of rights are universally binding, but not rules relating to the latter (p. 37). Also, her contention that international customary law has some applicability in the realm of territorial claim by prescription is not fully explained, particularly in light of her generally well-argued contention that customary law is fundamentally a nebulous fiction. Furthermore, the book, in my opinion, contains one noteworthy, albeit nonfatal, structural flaw. By pursuing so many facets of the theory of international law, the author runs the occasional risk of losing the drive and focus that a single narrative line might have had. What I consider to be the most important elements of her thesis seem to fade around the edges, whereas the most minor feature of her theory, i.e., the taxonomy of international legal rules, comes on loud and strong.

Despite these reservations, De Lupis's book is a fascinating and provocative contribution to the continuing search for a more perfect theory of international law. What is particularly impressive about her efforts is her ability to interweave variations of old ideas with creations of her own imagination. Indeed, the author has produced the closest thing to a consensus

theory of modern international law. In the eyes of the socialist and Third World nations, De Lupis's theory has the additional advantage of cleansing traditional international law of two of its many original sins.

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World Politics and International Law. By Francis A. Boyle. Durham: Duke University Press, 1985. Pp. xi, 366. Index. \$14.75, paper.

American political scientists since World War II have postulated that international law and organizations are generally irrelevant to world politics. Hans Morgenthau's realist-school works of the early postwar era introduced and crystallized the concept.¹ In a precursor to his vaunted *Politics Among Nations*, Morgenthau announced that "the legalistic approach to essentially political problems is but an aberration from the true laws of politics."² He later discussed the "iron law of international politics, that legal obligations must yield to the national interest."³ For years, only Louis Henkin's *How Nations Behave* has offered a lawyer's comprehensive rebuttal.⁴

From his perspective as both political scientist and international lawyer, Francis Boyle directly disputes Morgenthau's view. *World Politics and International Law* contends that international law and international politics are inextricably intertwined. Labeling problems "essentially political" ignores this symbiotic relationship. The observance of law does not conflict with the national interest: it is *part* of the national interest. Boyle urges nations in general, and the United States in particular, to pay more attention to law in international affairs.

Part I is a thorough historical review. Boyle presents the early American international legal positivists as men acutely aware of the "dynamic interrelationship between power and law in international affairs" (p. 22). He describes their impressive list of achievements from 1898 to 1917, the point at which a radically different Wilsonian legalism-moralism took precedence for a short time. That and the ensuing isolationism led to the Second World War. The renaissance of international legal positivism in the immediate postwar era brought about the proud achievement of the United Nations.

Boyle then describes the replacement of positivism by the power-politics realism of his mentor, Hans Morgenthau. It has been the power politics of the realists following the Korean War that has produced "a series of unmitigated disasters for the United States government" (p. 56). Boyle discusses how Morgenthau abandoned his own theory in later life, opening the

¹ Realists have a power-politics view of the world, in which states are rational, unitary actors engaged in a utilitarian calculus designed to extend and solidify their power.

² Morgenthau, *Diplomacy*, 55 YALE L.J. 1067, 1078 (1946).

³ H. MORGENTHAU, IN DEFENSE OF THE NATIONAL INTEREST 144 (1951).

⁴ L. HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (2d ed. 1979).

door for Boyle's own "functionalist" approach (one suggested years earlier by Morgenthau himself but abandoned in favor of realism). But, he asserts, Morgenthau's followers—Kissinger, Brzezinski, Haig, Reagan, *et al.*—still cling to the realist approach, with the results presented at length in part III.

Boyle focuses on the law of force and its effects during international crises. In a crisis, "[i]nternational politics is and becomes international law, while international law is and becomes international politics" (p. 81). He eschews the standard realist focus on legality *per se*:

[T]he primary emphasis of a functionalist analysis is upon the operational process of management, not upon the . . . promulgation and enforcement of rules. The cardinal task of functionalism is thus to analyze the ability of international law and organizations to contribute to the successful management of international crises and the peaceful resolution of the underlying disputes [p. 131].

Boyle proposes a five-step method by which public international lawyers and international political scientists can jointly analyze the interaction between international law and politics in times of crisis (p. 78). They must gather descriptive statements from case studies; derive sets of theoretical propositions from the statements; construct a general theoretical model; formulate and test predictive hypotheses; and then make recommendations on the promulgation of new law, the improvement of organizations and the alteration of national decision-making procedures.

Part II is the analytical core of Boyle's work. It is well structured and clear. He concentrates on the second step of his method, deriving a set of theoretical propositions concerning the roles of international law and organizations in an international crisis. His single case study is Israel's daring 1976 military raid against Palestinian terrorists who had hijacked a passenger jet and forced it down at Entebbe airport in Uganda. The raiders rescued the hostages and, as retaliation against Uganda's complicity with the hijackers, destroyed the Ugandan Air Force on the ground.

Boyle initially identifies five functions that international law and organizations served in the Entebbe case: the *definition* of applicable standards, as perceived by the actors; their service as elements of *decision* in Israeli crisis management; the *adjudication* of the dispute between the actors; the *resolution* of the crisis; and the *redefinition* of standards in light of the actors' experiences (p. 82). Focusing upon each function in turn, he derives 33 separate propositions from the Entebbe facts. The first proposition is that "[i]n time of international crisis, governmental decision makers will define their vital national interests to include considerations of international law and vice versa" (p. 157).

One can separate Boyle's five functions into two groups. Definition, adjudication and redefinition are all essentially prescriptive functions. They deal with the stock question of an international legal positivist: Did the Israeli raid violate international law? The positivist who seeks a simple yes-or-no answer, Boyle contends, is missing the point. Instead, international law and organizations directly and clearly affected Israeli and Ugandan perceptions of the legality and rightness of certain actions, and of their own

interests (definition). The UN Security Council provided a forum for the actors to test their interpretations of the law, and a forum for the international community to react to the actions taken (adjudication). The events propelled the solidification of international opinion against hostage taking, and the consequential change in international law to include a convention against hostage taking (redefinition).

Thus, international law is and becomes international politics and vice versa. Boyle makes his case regarding the prescriptive functions. In these interpretive phases of the crisis, though, international law and organizations merely outlined the standards, forums and procedures relevant to the situation. The active phases of the crisis, where states make their moves against the background of the aforementioned information, relate to law's functions of decision and resolution.

Boyle's case in the active phases is weaker. His key proposition in the decision stage is that "[i]n time of international crisis, a government will initially pursue those viable options it perceives to be the 'least violative' of the international legal order" (*id.*). (Building up to a general theoretical model, Boyle goes on to list a half-dozen other international crises, from the Cuban missile crisis to the Iranian hostage affair, where the "least violative" principle played a role (p. 160).) Although the proposition amply refutes the argument that law is totally irrelevant to international politics, it says very little more. "Initially" and "viable" are loaded words. Boyle makes clear that Israeli decision makers agreed early on that a raid was the only truly viable option because they perceived that the very existence of their state was in question. He stresses that they worked through legal channels first, asking France, the UN Secretary-General and the International Civil Aviation Organization to intercede. But after those formal steps, none of which were ever really expected to succeed, a raid was inevitable. The Israelis had a good faith belief in the legality of their actions, but would have taken them in any case.

Likewise, in the resolution stage, international law and organizations seemed important only when convenient. Uganda submitted its complaint to the Security Council as a face-saving ploy. It had decided that the political and military costs of carrying out its threat of retaliation against Israel were too high; at the United Nations, Uganda could depend upon the inevitable majoritarian condemnation of Israel by the anti-Israel general membership, even if the Security Council took no action. The primary proposition from the resolution stage is that "[a] party to an international crisis will resort to a competent political/legal forum when it believes that a peaceful and satisfactory resolution of the dispute is possible there" (p. 158). This should not surprise even the most cynical of political scientists. "Satisfactory" is a loaded term; international organizations are denied any role at all in many situations.

In both the decision and resolution stages, public opinion and perceived vital national interests were key considerations, while international law and organizations played attenuated roles. Boyle argues convincingly, in the abstract, that a "dialectical interaction" generally exists between vital na-

tional interests and international law, where states will construe the former to incorporate the latter (p. 79). At Entebbe that symbiosis was not evident. Israel believed that its raid was legal. Idi Amin had no regard for international law whatsoever, resorting to the Security Council in pure self-interest (p. 123). By sheer fortuity, the dictates of international law and the authority of international organizations coincided somewhat with the actors' chosen courses. Boyle's functionalist analysis here works to undermine his fundamental thesis.

While part II has an international focus, part III concentrates on the interplay between the national and international legal and political dimensions of crises. Through a critique of all the main foreign policy initiatives of the Carter and Reagan administrations between 1979 and 1984, it means to show how a functionalist approach can improve American foreign policy. Analyzed in depth are the Iranian hostage crisis, the U.S. response to the Israeli invasion of Lebanon, arms control issues, and the troubles in Grenada, Nicaragua and El Salvador. Boyle finds errors ranging from the use of flawed decision-making processes to wanton disregard for international law. The "elementally lawless" Reagan administration carried out a "comprehensive and malicious assault upon the integrity of the international legal order" (p. 290). Closer attention to and use of international law and organizations, Boyle concludes, would have avoided or mitigated most of America's foreign affairs troubles during the period.

Boyle's legal reasoning is generally sound. Critical passion, however, sometimes leads him to implausible conclusions. For instance, he presents "hypothetical legal arguments" to defend the Iranian students' seizure of the American Embassy: the extensive American intelligence activity in the Embassy could have given the students reasonable apprehension of an imminent American-sponsored coup d'état, making the seizure a legitimate exercise of Iran's right of self-defense under the UN Charter (p. 188). In his zeal, he neglects to consider that major revelation of this activity surfaced only after the seizure and subsequent pillaging of the Embassy, and that Iran had nonviolent legal remedies available (namely, expulsion of the offending diplomats and/or severance of diplomatic relations). This latter oversight is especially glaring in a book dedicated to the rule of law. Boyle also carries arguments to unconstructive extremes, as where he contends that the United States should bring Israeli leaders to trial in the United States as suspected war criminals with regard to the Sabra and Chatila refugee camp massacres (p. 236).

Boyle's presentation is seriously marred by its often crass tone. He descends from articulate analysis of literature and recounting of events to bemoaning "the rape of Grenada" by the "demented" Reagan administration (p. 290). President Carter is "foolish," lost in "positivistic delusions of self-righteousness" (pp. 191, 199). Boyle derides the "rotting morass" (p. 57) of realist power politics, spitting out "Machiavellian" as a derogatory adjective with a frequency and bitter tone more familiar to inflammatory ideological tracts than to reasoned political science discourse.

This tendency to vitriolic attack goes well beyond artistic license to detract from the work as a whole, distracting the reader from the more com-

mendable analysis and conclusions. It also might cause even the most tolerant of readers with different analytical persuasions or subtler biases to question the value of the entire work. Had Boyle implied a belief that reasonable people may differ with him, readers with other political views would accept, or at least give a fair hearing to, his analysis in spite of the disagreements. Boyle forces such readers to discount his analysis because of the differences. A close reading of the well-researched text does not support the book's *prima facie* appearance of irrationality and knee-jerk bias, but the initial impression leaves its mark.

Although Boyle probes deeply into Entebbe, he lacks breadth of scope in describing current practices. Boyle's post-World War II analysis is limited to Entebbe and a half decade of American national security issues. From the book's tone, one expects to see a detailed argument that, even beyond the Reagan administration, the United States brazenly violates key principles of international law on a routine basis. But Boyle shows no interest in describing the broad contours of the situation. Moreover, he gives little indication that his elegantly drawn functionalist analysis bears any relevance to past events in U.S. foreign policy as they actually unfolded. Given the depth of his research, these omissions seem contrived: if the United States in practice has generally obeyed international law since World War II, presentation of this fact might weaken the urgency of Boyle's plea for change.

The omissions create the risk of misdirection in the exhaustive derivation of a set of theoretical propositions from the Entebbe case. If the law is usually obeyed, an accurate general theoretical model would take that fact into account. Boyle's and the reader's time would be better spent deriving theoretical propositions from a case where the law was clearly obeyed.

On the other hand, Boyle's strategy perhaps serves best to focus the reader's attention. Improvements in international law and organizations and in national decision making are needed most where the system fails. In this case, Boyle's proposition that international law and organizations are relevant to the conduct of international relations could be proved in the main by systematically citing examples of such relevance. Part I takes this proof through the formation of the League of Nations after World War I, but no farther, implying that the proposition does not ring true in more contemporary times. Rather than focusing upon one group of recent failures in American foreign policy, Boyle might have devoted part III to an analysis of the overall postwar relevance of international law and organizations. Parts II and III are not complementary—one of the two is time better spent elsewhere.

Boyle writes with a lawyer's weakness for leaving key legal terms undefined (he discusses the codification of customary international law at length without attempting a definition), which may discourage a nonlegal audience. The format and overall language, though, are those of a sophisticated political scientist. The study is well documented. Boyle does not totally succeed in bridging the communication gulf between lawyers and political scientists, but he lays a strong foundation for future work.

That Boyle's functionalist analysis, as developed to date, has left blank areas in the intricate mosaic of foreign affairs is not surprising. His list and

description of functions may need amending as analysis of more cases fills out the picture, to ensure that theory matches experience. Others would do well to take up his five-step research method as a guide for further study. *World Politics and International Law* is a significant step toward a truer understanding of the interrelationship between international law and world politics.

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International Law and the Independent State (2d ed.). By Ingrid Detter De Lupis. Brookfield, Vt.: Gower Publishing Company, 1987. Pp. xxvi, 252. Indexes. \$49.95.

The notion that the sovereignty of the independent state is less wholesome today than it has traditionally been is an axiom of modern international law. Even though a state can still lay claim to sovereign powers within its territory, its freedom to legislate on matters that were once deemed to lie within its reserved domain has been substantially circumscribed. What is particularly remarkable about this new phenomenon of truncated legislative supremacy is that it was essentially accomplished with the specific consent of the state itself and by virtue of the operation of general international law. Thus, what was once regarded as an oxymoron, i.e., the concept of limited sovereignty, has now become a permanent fixture on the landscape of the contemporary law of nations.

In its traditional meaning, sovereignty presupposes supremacy or superiority of the sovereign. It is an attribute of all independent states that manifests itself in both their external and their internal conduct. The corollaries of sovereignty are equality, independence and exclusive jurisdiction over a defined territory. Under modern international law, however, the sovereignty of a state is encumbered with so many fetters that the state can no longer lay claim to absolute sovereignty over all persons and property within its territory. It is this dilemma of the modern law of nations, i.e., how to reconcile state sovereignty with the limitations placed upon it, that constitutes the thrust of Professor Ingrid Detter De Lupis's analysis in this essay.

The book, which is a second edition, is written in the form of a glossatorial commentary on the various aspects of international law that intersect with the independence of a state. In her discussions the author remains steadfastly faithful to the texts of the relevant treaties and conventions on the given subject. Among the many areas of international law dealt with are the law of the sea, international human rights law, the law of treaties, air and space law, the international law of armed conflicts, diplomatic and consular law, the law of international organizations and international environmental law. Two issues are central to the theme of the book. The first is the extent to which rules of international law encroach on the exercise of sovereignty in a state's own territory. The second concerns the guarantees that international law provides to ensure that the independence of a state is not reduced by treaties that it concludes under external pressure. In her analysis of the

latter topic, the author shows particular concern for the needs of the developing countries.

The author's discourse opens with the axiomatic statement that a state enjoys full sovereignty and self-determination over its territory and over all persons and property in that territory unless international law contains specific rules to the contrary. In her opinion, there is a presumption in favor of full sovereignty of a state over its territory and the burden of proof rests with the party that claims that the territorial sovereignty of a state has been restricted. The author opines that sovereignty embodies two things: independence and self-determination. The former entails the right to remain free from outside interference. The latter denotes the positive elements of the same rule, i.e., the right to secede from colonial rule, the right to be the supreme power within the territory of the state and the right to form a representative government (p. 227).

De Lupis feels, however, that there are certain exceptions to sovereignty. These exceptions fall into two groups: those relating to the territory itself and those relating to individuals and property in that territory (p. 228). In her view, these exceptions either are imposed on the state by general international law or are self-inflicted through treaty law. The author's carefully reasoned opinion is that treaties that are procured through military coercion (imposed treaties) are void under international law because they do not take effect at all. However, an exception to this rule could be made with regard to boundary treaties (pp. 227, 229). The author further concludes that to be valid, a treaty that imposes territorial restrictions on a state's sovereignty must be free of coercion and must have the full and free consent of the aggrieved state. Such consent must not be construed as following automatically from state succession, even if the treaty concerns the land itself and thus is technically in rem (p. 229). De Lupis states quite categorically that there are no servitudes in international law. In her words, "there are certainly no servitudes which survive state succession" (*id.*).

For purposes of her subsequent analysis, the author distinguishes an "imposed treaty" from an "unequal treaty." The former is induced by military coercion, whereas the latter is concluded freely but on unequal terms (p. 195). In the author's opinion, not all unequal treaties are void. "To regard [all unequal treaties] as void would merely endanger the rule of *pacta sunt servanda* . . ." (p. 195). However, she does not articulate any formula by which to determine when an unequal treaty is void or voidable. She then goes on to distinguish "unequal treaties" from "potentially unequal treaties" (p. 197). The latter term has a built-in ambiguity even though De Lupis defines it as those treaties that need the continuous consent of the host state to be valid (p. 198). She makes the point quite succinctly that potentially unequal treaties are not void per se under international law (p. 199). From this analysis she postulates what she calls the continuous consent theory, according to which a state may at any time notify the other contracting party that it no longer consents to the potentially unequal treaty. Such notice may be served either by the state that entered into the original treaty or by its successor.

De Lupis thinks that her new theory is better than the *rebus sic stantibus* doctrine, which she perceives as a great threat to the stability of international law (p. 198). Whereas *rebus sic stantibus* exposes all treaties to the threat of subsequent invalidation, her continuous consent theory permits a state to invalidate only a limited group of treaties, i.e., those that delegate to others sovereign functions within a state's territory. Examples of such treaties are military base agreements, other in rem agreements, capitulation treaties and treaties that delegate legislative functions to an international organization. Because of the limited scope of the treaties to which the continuous consent theory applies, the latter poses less threat to the principle of *pacta sunt servanda* than does *rebus sic stantibus*.

Still on the question of treaties induced by coercion, the author acknowledges that contracting parties are also subjected to other forms of nonmilitary coercion such as economic or political pressure. In fact, she feels that virtually all treaties contain some elements of these latter types of pressure (p. 227). From this observation she reasons that agreements concluded under economic or political pressure are neither void nor voidable under international law (*id.*). On this point, as well as on the question of the invalidity of unequal treaties, the author is bound to disappoint her client states—developing countries—which feel that an international agreement that is induced by unlawful economic or political pressure ought to be voidable at the least. Third World nations will also find more sympathy for their cause in the prevailing Soviet theory, that all unequal treaties, including what De Lupis calls potentially unequal treaties, are void *ab initio*.¹

The author makes other interesting observations in her book. For example, in her discussions of "Other Restrictions of Sovereignty Relating to Territory," she asserts that "territorial sovereignty cannot imply a right to take action within a territory when such action is likely to cause damage to neighboring states" (p. 94). In her view, this principle "could also be held to imply that a state must not pollute, or allow pollution of its own ground-water which, in case considerable damage is caused, may have disastrous effects on neighboring states" (p. 95). Put quite simply, the author thinks that under general international law, even in the absence of any applicable treaty law, a state may not pollute its rivers, ground water or international rivers because any such pollution is bound to have a deleterious effect on the welfare of other states.

With regard to the restrictions on state sovereignty vis-à-vis private individuals, the author asserts that it is no longer true to say that only aliens in a country enjoy certain minimum rights under international law. In her view, even nationals have such rights by virtue of general international law rules of human rights (p. 101). In fact, the author dismisses as too vague the

¹ The best articulation of the prevailing Soviet doctrine on unequal treaties may be found in Talalaev & Boiarshinov, *Neravnopravnye Dogovory kak Forma Uderzhaniiia v Kolonial'noi Zavisimosti Novykh Gosudarstv Azii i Afriki* (Unequal Treaties as a Form for Prolonging the Colonial Dependence of the New States of Asia and Africa), 1961 SOVIET Y.B. INT'L L. 156. See also A. TALALAEV, IURIDICHESKAIA PRIRODA MEZHDUNARODNOGO DOGOVORA (The Juridical Nature of an International Treaty) 218 (1963).

notion that aliens should be subjected to a "minimum standard." Rather, it is more realistic to apply the safeguards of human rights to protect aliens and nationals alike in a state's territory (p. 126). The author, however, qualifies her view somewhat by stipulating that international law guarantees equal protection of the law to aliens and nationals alike only with regard to what she calls fundamental human rights (*id.*). She fails to spell out when a human right becomes fundamental.

The author's discussion of this entire problem raises more questions than it resolves. At various points in the analysis, she uses different incongruous terms to refer to the rights that aliens and nationals supposedly enjoy on an equal basis. She speaks of them variously as "the most fundamental human rights" (*id.*), "the human rights enumerated in the Universal Declaration of Human Rights" (*id.*), "an individual's general human rights" (p. 129), "fundamental rights of individuals" (p. 130) and "basic human rights" (p. 133). It should be noted that among the human rights that are listed in the Universal Declaration of Human Rights is the right to own property (Art. 17). But De Lupis asserts elsewhere in her book that the right to own real property is not a fundamental right (p. 126). Other rights listed in the Universal Declaration include the right to vote (Art. 21), the right to social security benefits (Art. 22) and the right to free education (Art. 26). It is not clear to me whether the author is suggesting that under general international law a state is obligated to treat its nationals and aliens equally with regard to this latter group of rights.

Not intended as a "think piece," the book breaks no new ground and postulates no fresh theory of state sovereignty. Rather, it offers a current restatement of the conventional viewpoint on many aspects of modern international law. A commendable feature is the fact that the author makes a good faith effort to draw upon Western as well as non-Western sources. At a time when it is fashionable for Western commentators to treat Soviet doctrine with benign neglect, De Lupis devotes more than token attention to the prevailing Soviet doctrine of international law even though she quite often disagrees with it.

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The International Law Commission. By Ian Sinclair. Cambridge: Grotius Publications Limited, 1987. Pp. viii, 177. Index. £28; \$49.

This volume embodies the Hersch Lauterpacht Memorial Lectures delivered by Sir Ian Sinclair at the University of Cambridge in 1985—that is, prior to the irresponsible behavior of the UN General Assembly in failing to reelect him (and Willem Riphagen) to the Commission in 1986. For almost 40 years the work of the International Law Commission has been illuminated by the contributions of its British members—Brierly, Lauterpacht, Fitzmaurice, Waldock, Vallat, Sinclair. It is true that members of the ILC serve, not as "representatives" of their countries but as "persons of recog-

nized competence in international law" (Art. 2, ILC Statute). Failure to observe this requirement is traceable to the vicious electoral quota system imposed by the General Assembly to further the "representation of the main forms of civilization and of the principal legal systems of the world" on the Commission (Art. 8), while minimizing the further provision of Article 8 that "persons to be elected to the Commission should individually possess the qualifications required" by Article 2.

Sinclair summarizes the establishment of the Commission to promote "the progressive development of international law and its codification" (Art. 1) and the subsequent politicization of membership. The size of the Commission has been increased to 34 members in order to pass around the pie (there are not 34 "principal legal systems" and the function of the Commission is *international law*). One wonders whether more than a dozen members of the current Commission are "persons of recognized competence in international law." A much smaller Commission composed of such qualified persons might better achieve the purposes for which the Commission was established. Sinclair does not go so far in his analysis and appears to accept the rationalization that if a state has a member of its nationality on the Commission, it will be more inclined to vote for a finished draft—a correlation that has yet to be established. He notes the absenteeism of members. An examination of the daily Summary Records of the Commission shows on the average at least 10 members absent each day—for which "justification" is advanced that they have more important work at home.

Despite these serious shortcomings, Sinclair concludes that the Commission—particularly in its earlier years—has made unrivaled contributions to the codification and progressive development of international law. In an informative section, he shows how the International Court of Justice and its members have been influenced by the Commission's work. In assessing its accomplishments, Sinclair faithfully examines the fate (the ultimate disposition) of the drafts adopted (e.g., how many were adopted by states in convention form and how many have been ratified or failed to attract support), but limitations of space have prevented him from giving sufficient detail or including actual texts to enlighten the reader about the specific provisions of the particular drafts on which he comments.

Nevertheless, he shows how the Commission prepared the way for the UN Convention on the Law of the Sea in formulating what became the 1958 Geneva Conventions on the Law of the Sea (retained with amplifications in the UN Convention); and how the Commission provided the basis for the current law of diplomatic and consular relations and has achieved a signal success in its work on the law of treaties. On state succession, the work of the Commission was largely overtaken by the contemporaneous behavior of successor states, although it may have had some impact on practice. The major work of the Commission on state responsibility is not completed, but it fully justifies the time it has consumed.

On the contrary, the Commission has wasted an exorbitant number of hours on topics such as the status of the diplomatic bag and the Draft Code

of Offences against the Peace and Security of Mankind. The latter attempts to draft in one code juridical provisions (which states are reluctant to accept) against aggression, terrorism, genocide, colonialism, apartheid, war crimes and, perhaps, drug trafficking. A pet project of some people in the UN General Assembly, it promises to be as useless (except for propaganda purposes) as the Helsinki Accords.

From his experience on the Commission and a comprehensive examination of its methods of work, Sinclair is able to make a number of valuable suggestions for improvement: more careful selection of topics likely to result in general acceptance; return to the Commission's former practice of not insisting that every topic on the agenda be discussed at each short session; deciding in advance on whether the result should always be a draft convention.

While this book appears designed for readers who already have considerable knowledge of the Commission and its completed drafts, it provides the informed insights and reflections of a person of recognized competence in international law and is a welcome contribution to the literature on the Commission.

HERBERT W. BRIGGS
Board of Editors

La Théorie des limites matérielles à l'exercice de la fonction constituante. By Marie-Françoise Rigaux. Brussels: Maison Ferdinand Larcier, s.a., 1985. Pp. 335.

This highly theoretical study examines the interrelationship among different legal orders from the perspective of material limits (in the sense of limits *ratione materiae*) on the exercise of constitutional power within a state. While purporting to be of general application, it is apparent that the prototype envisaged by Mme. Rigaux is the state whose political and legal system is based upon a written constitution, whether unitary or federal. Her examples are drawn overwhelmingly from three European countries, Belgium, France and the Federal Republic of Germany, and to a lesser extent, Greece.

Among the varieties of material limits considered is a large category comprising external limits originating in another legal order (ch. 3 of title II, pp. 139-98). Part of this chapter discusses the ways in which the exercise of the constitutional function of a component state in a federation is subordinated to the federal constitution (pp. 143-49). For example, Article 4, section IV of the U.S. Constitution requires the states to adopt a republican form of government. In federal states, Rigaux perceives a third type or level of legal order whose function is to govern and maintain the structural relationship between the federal and the provincial orders. The exercise of constitutional competence by the states or provinces, as well as by the federal legislator, is constrained by limits imposed by this third order, but the states are not directly subordinated to the federation. The third order

guarantees the pluralist form of sovereignty that the people have chosen, if only by implication, by agreeing on a federal structure. A federal constitutional court provides the concrete expression of the guarantee, for example, in its task of interpreting and maintaining a provision such as Article 79(3) of the German *Grundgesetz*, which prohibits any revision relating to the organization of the federation in *Länder* or to the participation of the *Länder* in the legislative process (pp. 83, 148). Here Rigaux takes issue with Kelsen and the Vienna school whose theories of the *Rechtsstaat* or *l'Etat de droit* have served to inspire centripetal tendencies in some constitutional analyses.

The greater part of this lengthy chapter is devoted to the subordination of the holder of the constitutional function to the international legal order (section 3, pp. 149–98). The author examines the interaction between a state's constitution and international law, including particular treaties, general customary international law and the constitutions of certain international organizations. There are four subsections: the first deals with provisions giving primacy to, or incorporating the general rules of, international law such as the celebrated Article 25 of the *Grundgesetz*; second, there are constitutional powers limited by treaty provisions affecting the future exercise of constitutional aspects of sovereignty such as provisions respecting the form of government of a state or guaranteeing the rights of minorities or limiting the exercise of external sovereignty, as in the cases of permanent neutrality. The third subsection treats limitations on constitutional power that may be imposed by membership in an organization, and the fourth discusses tacit limitation by general rules of international law, including, but not limited to, *jus cogens*. This reviewer was disappointed by the skeletal analysis and discussion of the domestic jurisdiction limitation in the UN Charter, and of the nature of states' obligations under the Charter to secure human rights and freedoms. Moreover, one lapidary sentence on page 179 on the effect of ratification of the European Convention on Human Rights does nothing to clarify the issue of the legal effect of the Convention on the law of a dualist party such as the United Kingdom. Rigaux falls into error in her next example, the OAS, as she refers to the exclusion of the state of Cuba from that organization (p. 180). But she offers the comment that both the OAS and the Organization of Central American States, with their provisions of "constitutional legitimacy" obliging members to maintain certain democratic principles and not to recognize governments established in their countries by coup or revolution, illustrate the permeability of the internal state order by the international legal order, whose authority the states recognize by belonging to such an organization.

The doctrine of the supremacy of European Community law over inconsistent national law receives some attention (pp. 182–83, 289–91), focusing upon the *Simmenthal* case. Rigaux's thesis is that the interconnection between the two orders can operate only to limit the exercise of member states' autonomy, and that the enactment of conflicting laws gives rise to responsibility. But we may also recognize "a greater authority" in particular Community provisions in areas where the legal order of a member state has

accepted the loss of part of its prerogatives. This reviewer admits to considerable difficulty in following the purported distinction between a limit on the exercise of sovereign legislative authority and the loss or abandonment of part of that authority. Rigaux seems anxious to refute any global proposition as to the primacy of Community law, and to affirm that the EEC is a collaborative association of states for the realization of certain objectives, but she is compelled to admit that respect for rules belonging to the Community sphere "reduces the efficacy" (p. 291) of national rules having the same object or subject matter. What precisely is meant by reducing the efficacy of legal rules remains a mystery. Important steps in the argument cry out for greater precision of language and additional concrete examples.

Some rules of general international law can produce limitations on the constitutional competence of state organs, provided that certain conditions are satisfied. National legal orders may be subject to certain rules of international law, for example, respect for fundamental human rights (pp. 188-90) and the principle of self-determination of peoples (pp. 190-95). The reasoning is hard to pin down, and one has to turn to the final part of the book, part II, title III, for a treatment of the validity of such external limitations, or the conditions that must be satisfied for these limitations to acquire obligatory force. Rigaux formulates a principle of reticulatory normativity of external limits ("le principe de la normativité réticulaire des limites hétéronomes") and seeks to apply it to the examples and arguments selected in the earlier chapter (see pp. 286-302). To have a limiting effect on national constitutional organs, the international rule must be temporary and capable of future amendment or abrogation; the material limitation affects the liberty of the national constituent and not its legal capacity, which means that an inconsistent national provision is valid in terms of the national system but may give rise to state responsibility. However, in the case of a rule of *jus cogens*, the capacity of the national organ may be restricted in terms of its own national law (pp. 302-06). Authority for these various validating conditions is sought in doctrine, in arguments from principle and, to a limited extent, in state practice, including the preparatory work of the Vienna Convention provisions on *jus cogens*. This reviewer was not entirely satisfied that the author sustained her main thesis, but the arguments arouse interest and call for further empirical testing and theoretical review.

This book is based on Rigaux's doctoral thesis and carries the unmistakable stamp of a mind trained in the civil law and attracted by generalized and abstract theories of law and the state. The work exemplifies a legitimate and distinctive approach and methodology that offer some illuminating insights into the relationship between different and distinct legal orders, but it is not an intellectual milieu in which a pragmatic and fairly positivist common law-trained international lawyer can feel at home. The book contains a useful bibliography and a detailed table of contents, but no index or lists of cases or treaties cited.

GILLIAN WHITE
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Enforcing International Law Through U.S. Legislation. By Elisabeth Zoller. Dobbs Ferry: Transnational Publishers, Inc., 1985. Pp. xiv, 189. Index. \$35, cloth.

In this book, Elisabeth Zoller, professor of law at the University of Strasbourg, identifies and categorizes acts of Congress that seem to respond to violations of international law by other states. Following this mammoth undertaking, she attempts to draw conclusions that might constitute "a general theory of unilateral remedies in peacetime" (p. 4).

The reasons given for studying U.S. legislation and only U.S. legislation (this is not a comparative review of national legislation enforcing international law) as evidence of customary international law seem questionable. These are that the "usually wide authority of executives in foreign affairs" does not characterize the U.S. system,¹ and that the United States is "the only state in the world that has systematically made its unilateral peacetime remedies public by legislation" (p. 3). One wonders whether U.S. legislation is, as the author asserts, "an exemplification of enforcement mechanism [*sic*] in international law" (p. 4).

The volume of statutes collected and analyzed is impressive. But often the author does not examine the admittedly elusive, but necessarily central, issue of *purpose*: whether Congress intended to enforce an international norm by enacting the law in question, or whether the President intended to do so by enforcing it. Indeed, virtually no attention is paid to any practice that may exist on the part of the United States with respect to the statute in question. Where the relevant international norm derives from treaty law, purpose can perhaps be inferred. In the case of customary norms, however, one is seldom sure whether Congress or the Executive acted with any knowledge of, let alone concern about, the rule purportedly enforced.

Nonetheless, the work should have considerable utility as an idea-generator for governmental officials putting together option papers. One can quibble about the author's categorization of certain laws, but overall the analysis is a huge and creative first step in exploring a largely uncharted area of international law.

MICHAEL J. GLENNON
Board of Editors

Judicial Remedies in International Law. By Christine D. Gray. Oxford: Clarendon Press; New York: Oxford University Press, 1987. Pp. xix, 250. Index. \$57.

This book was originally formulated as a Ph.D. thesis submitted at Cambridge University. It deals with one aspect of the consequences of breaches

¹ Much of the analysis seems based on a simplistic premise: that "the President has no general retaliatory authority." He may, the author claims, "act only under a delegation which, falling short of being embodied in the Constitution, may be given only by the legislative branch" (pp. 0-11). The President's constitutional power over recognition, diplomatic relations and treaty negotiation is not considered.

of international law. As Ian Brownlie indicates in the preface, "International lawyers always pay tribute to the principle of judicial settlement of disputes, but in recent times most writers have tended to avoid touching on the particular questions falling under the fairly loose headings of the 'judicial function' or 'state responsibility'."

Christine Gray addresses the nature and role of judicial remedies in international law. The scope of the study is impressive, both in the range of arbitral and judicial bodies dealt with, and in the variety of remedies examined. The author considers the approach of arbitral tribunals, the World Court, the European Court of Justice, human rights courts, administrative tribunals and international commercial tribunals to the question of judicial remedies. Her goal is to find out whether these various bodies have developed common rules in the field of remedies. She eventually comes to the conclusion that they have not. Thus, it becomes impossible to refer to a coherent international law of remedies. One may wonder, however, how any other conclusion could have been reached in light of the diversity of the judicial remedies examined. For the international arbitral practice alone she considers negative injunctions, *restitutio in integrum*, specific performance, declaratory judgments, damages, punitive damages, nominal damages and interest (pp. 11–33). She also examines interim measures of protection (pp. 69–79) and advisory opinions by the World Court (pp. 111–18), as well as rulings by the European Court of Justice (pp. 120–48). Nonetheless, the book is a useful reminder of the diversity of means by which international law may be adjudicated by international tribunals.

A recurrent argument in the book is that the primacy (or even the possibility) in international law of the remedy of *restitutio in integrum*—as adopted by the Permanent Court of International Justice in the *Chorzów Factory* case—finds no support in arbitral and judicial practice. Gray justifies her position by invoking the rarity of *restitutio in integrum* awards in arbitral practice and its refusal in certain cases (pp. 14–15), and by pinpointing that in the *Chorzów Factory* case, "not only was restitution not requested by the claimant state . . . , but also the treaty which the Court had to apply gave the injured party the treaty right to demand restitution in kind" (p. 96). There is force to these arguments. However, they fail to take into account that restitution, like Janus, has two faces: restitution in kind and restitution by equivalence ("payment of a sum corresponding to the value which a restitution in kind would bear").¹

Gray is apparently not optimistic about the role of judicial remedies in international law. She rightly raises "the question of the limits on what can be expected from and achieved by [such remedies]" (p. 210). However, she leaves open the daunting question of what could replace them.

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¹ *Factory at Chorzów*, 1927 PCIJ (ser. A) No. 17, at 47.

Treaty Interpretation: Theory and Reality. By Edward Slavko Yambrusic. Lanham, New York, London: University Press of America, 1987. Pp. xi, 298. \$28.50, cloth; \$15.75, paper.

This book would be an important starting place for anyone interested in doing research on treaty interpretation either in the abstract or in reference to a particular case. The first part consists of a good comparative analysis of state practice with respect to the interpretation of treaties: the common law tradition (the United States, the United Kingdom), the jurisprudence of the continental civil code (Austria, France, Germany) and the socialist law approach (the USSR). On this point, the author's conclusions are that in state practice the primary emphasis is upon the will of the parties as expressed in the text of the treaty, but that there exist no obligatory rules of treaty interpretation that states share in common.

In light of these findings, the author then proceeds to analyze the jurisprudence of the International Court of Justice with respect to treaty interpretation up to about the time of the adoption of the Vienna Convention on the Law of Treaties in 1969. Here the author concludes that the Court considered "the so-called canons of interpretation merely as guides to the logical process of the interpreter's reasoning rather than the obligatory norms to be followed and applied by the Court" (p. 144). For this reason, the author faults the Court for failing to provide certainty, objectivity and predictability in its jurisprudence of treaty interpretation.

The third part of the book examines the *travaux préparatoires* of Articles 31 and 32 of the Vienna Convention. In the author's opinion, the International Law Commission likewise failed to provide the international community with a general rule of treaty interpretation. Hence his conclusion that Articles 31 and 32 are not declaratory of customary international law on this subject (pp. 245-46). At the end of this exhaustive analysis, the author argues persuasively for Professor McDougal's contextual approach to the interpretation of treaties.

FRANCIS A. BOYLE

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Weltpolitik: Strukturen—Akteure—Perspektiven. Edited by Karl Kaiser and Hans-Peter Schwarz. Stuttgart: Klett-Cotta, 1985. Pp. 742. Index.

This is not a book on international law in general, nor does it contain a collection of essays on specific international legal problems, but it should be useful to all those who are interested in the general background and the most important spheres of international politics in our time. It tries to give a reliable picture of global, as well as many regional, political problems. Such an undertaking could hardly be successful without the cooperation of first-rate authors. The editors have assembled such a collection of competent authors. Only a few of them can be considered specialists in international law (Wilhelm Grewe, Boris Meissner, Wolfgang Graf Vitzthum); the great majority of the articles are written by political scientists. Even where prob-

lems of international law are touched on (e.g., in the articles on nuclear weapons, arms control, oceans, space, human rights), no discussion of legal problems can be found—this proves once more the neglect of international law by many political scientists.

All in all, 45 authors contributed to this work, which is divided into two parts: global problems and regional problems. In the first part, we find chapters on structural problems of the international community, for example, on the relevance of the power factor in the system of sovereign states, and on the most important challenges of our time—East-West relations, economic problems, the proliferation of arms, human rights. In the part on regional problems, there are articles on the relations among Western states, the socialist system and the Near East; other chapters deal with Asian problems, Africa and Latin America.

On average, each chapter is less than 20 pages. This excludes any thorough discussion of the problems, but in the aggregate a fair survey is afforded. If the articles were not written by well-informed authors, the book would not deserve a review in this *Journal*. A Western and conservative approach dominates the book, but this does not diminish its merits.

It does not make sense here to go into details. Some chapters and sub-chapters are superficial and some statements are even wrong. For instance, one author asserts in his short remarks on the question of an international law of the environment (pp. 214 ff.) that no rule of international law inhibits transfrontier pollution. One sentence on page 331 touches upon the American intervention in Grenada; Namibia is dealt with in another chapter in only a few pages (pp. 654 ff.) and without adequate discussion of the international law aspects.

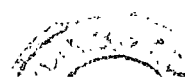
The book is recommended for those who seek a global survey of the main political problems of our time. For specialists, especially scholars and practitioners of international law, neither the articles themselves nor the bibliographical references provide sufficient guidance or information.

RUDOLF BERNHARDT

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The Regulation of International Economic Relations Through Law. By Palitha Tikiri Bandara Kohona. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1985. Pp. xxii, 280. Index. Dfl.150; \$49.50; £41.75.

Palitha T. B. Kohona completed this book while working for the Australian Department of Foreign Affairs. He did most of his research at Cambridge University while writing his Ph.D. thesis on international economic relations. Although the book evidences a great deal of thought on the author's part, its rather abstract content does not make it of practical use to attorneys who wish to familiarize themselves with the specific legal and structural aspects of the various international economic organizations. Nevertheless, the book is valuable to anyone generally interested in interna-



tional relations. It offers general information on numerous organizations and provides a very comprehensive bibliography.

Kohona's thesis is that "international economic regimes," in their growth, are influencing the domestic policies of individual states to an increasingly substantial degree, and that this influence is by and large consented to by the individual states involved. The author attributes the development of "international economic regimes" to the consent of the member states. Kohona argues that this consent is given in the commonly shared belief that all groups and nations affected by world economic change must be effectively represented through active participation, and that economic relations should be governed by rules derived from norms accepted by all groups of nations involved.

Kohona contends that groups and nations that share this representation-oriented outlook have engaged in economic relations, and have reached agreements that, in turn, have promoted the growth of international economic law. To ensure that the objectives of the underlying agreements are attained, the groups and nations concerned have created organizations that determine new policies, adopt norms of conduct, implement decisions and resolve disputes. In exercising these functions, such organizations have ushered in the creation and evolution of "international economic regimes." According to the author, states consent to that development in the hope of achieving their mutually beneficial goals more effectively and efficiently. In return, states must surrender a certain degree of sovereignty in that they must work out internally how they will implement the policies adopted by an organization.

One criticism that could be raised about the book is that the author presents an overly abstract theory of international relations. He places too much emphasis, it seems, on the theoretical structure of membership in international organizations and the consent of nations to such membership and its attending rights and obligations. Very little discussion is provided concerning the international economic forces themselves that have led to the establishment of international agreements and have shaped those agreements and the institutions under which they are administered. It is the specific, and varying, need of individual countries to respond to the growing economic interrelationship and interdependence of nations that has caused them to consider membership in international economic organizations and determines the scope of the economic matters dealt with by such organizations. Any discussion of international economic organization that ignores or minimizes these factors provides a less than complete characterization of the numerous and widely differing international economic institutions.

A second comment is that the book is focused heavily on the perspective of developing countries. The internal workings of international organizations are analyzed almost exclusively from this viewpoint. Such a perspective may be appropriate for organizations like UNIDO and UNCTAD, which deal almost exclusively with issues of primary relevance to developing countries, but it provides less insight into how and why other organizations, such as the OECD, function. Membership in these other organizations is drawn significantly or almost entirely from industrialized nations, and the

problems they seek to resolve are those of trade and investment primarily between industrialized countries. Between those two types of organizations is yet a third category covering organizations such as the GATT, which attempt to deal with problems affecting both groups of nations. In such organizations, it would be more appropriate to consider the economic perspectives of both the industrialized and the developing countries, whose viewpoints in many cases conflict, and the manner in which the organizations attempt to balance these conflicting points of view.

These criticisms notwithstanding, the book is helpful in that it puts international economic law into some perspective. The author concludes that norms of conduct adopted by international organizations can serve only as points of reference; that they are enforceable only insofar as individual member states consent; and that, consequently, dispute resolution should not follow any universal rules or strictly legal procedure if social, political or cultural conflicts are to be avoided. Rather, dispute resolution in international economic affairs should be oriented toward a more ad hoc approach by which the conflicting parties reach mutually acceptable terms that apply only to their specific situation.

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Law and its Limitations in the GATT Multilateral Trade System. By Olivier Long. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1985. Pp. xi, 145. Index. Dfl.100; \$38.50; £27.75.

"[O]n the international plane there is only one system which provides in legal form a framework of rules and procedures governing international trade and trade relations and which embodies legal rights and obligations between its member countries. This system is the General Agreement on Tariffs and Trade (GATT) . . ." (p. 4).

In this short but precise book, Olivier Long, former director general of GATT (1968–1980) and professor at the Graduate Institute of International Studies in Geneva, provides us with an English translation of his Hague Academy lectures on the GATT (delivered in 1983). Beginning with the definition of GATT quoted above, this book is an exceptional and valuable work, and not merely a set of reminiscences by a person who has had direct and central experience with the institution he describes. It is a truly scholarly attempt to reflect on the meaning of some of those experiences. The manner of presentation is concise and well organized. It reflects extensive reading in the related literature, as well as extensive discussions about the manuscript among a number of GATT officials. This is clearly the most authoritative short overview of the GATT as a legal institution.

The GATT is truly a perplexing institution. It became what it was never intended to be—the central international organization for world trade—after the 1948 charter of the International Trade Organization failed to come into force. Thus, the GATT has had to exist without the many institutional clauses found in normal organization charters. These deficiencies are noted by the author, who describes many of the fascinating circum-

stances of practice and evolution that have allowed the GATT to exist as a pragmatic and reasonably effective legal order. Particularly to be noted are excellent accounts of the troublesome Multifibre Agreements (p. 32), the legal questions of preferences for developing countries (p. 31), voting and consensus decision making (p. 55) and the procedures for dispute settlement (p. 65). While the opinions and perspectives of the author will certainly not be universally accepted, they are well stated and carefully thought out.

After an opening chapter on "The Legal Framework" of GATT, in which the author surveys the history of GATT and provides an overview of its rules, Long proceeds to an examination of the GATT as a "Forum for Negotiations." He then turns to a chapter on decision making and organizational structure, entitled "The Functioning of GATT." A fourth chapter deals with "supervising" the GATT, focusing on the dispute settlement process, and presenting some judgments (which, of course, can be debated) such as that the GATT Contracting Parties' "main objective is to produce recommendations designed to protect this balance [of advantage], rather than have recourse to sanctions" (p. 71).

After an excellent chapter on the evolution of a GATT legal structure to promote economic development, the author turns to his conclusions. Let some of his words carry the flavor:

In a multilateral trade treaty such as the General Agreement the legal rules provide what the member countries expect from them: the assurance of a reasonable degree of certainty in the conventional conditions under which international trade takes place, and transparency in the conduct by member countries of their trade relations.

The rules and procedures of the GATT are such that they can evolve and be modified in response to changes in the economic and political conditions that influence trade relations [p. 107].

As the world moves forward into the eighth and most complex trade negotiation sponsored by GATT, a negotiation that not only will likely be the last in this century, but also could frame the structure of trade well into the next century, Long's book will be both a delightfully short introduction for those new to the subject and an authoritative source of information and judgment, particularly about the legal institutional aspects of GATT.

JOHN H. JACKSON
Board of Editors

Interdependence in the Post-Multilateral Era: Trends in U.S.-European Trade Relations. By Stephen Woolcock, Jeffrey Hart and Hans van der Ven. Cambridge: Center for International Affairs, Harvard University; Lanham: University Press of America, 1985. Pp. xxv, 138. \$19.50, cloth; \$7.75, paper.

As its title suggests, the authors of this book believe that we have entered an era in which multilateral efforts to resolve trade disputes are doomed to

failure. The premise of the book is that differences in national approaches to trade and the formulation of industrial policy (as illustrated by case studies of U.S. and EC policy with respect to three industrial sectors—steel, automobiles and “telematics”) are so great that the establishment of an effective multilateral regime to govern international trade is a virtual impossibility, at least outside the tariff area. The authors focus in particular on the growing use by individual nations of a variety of industrial targeting measures, including nontariff barriers on imports. They conclude that competing sovereign national interests and approaches are likely to prevent the achievement of any coordination of multilateral policy or effective multilateral resolution of the trade conflicts such measures create.

Despite its gloomy forecast about multilateralism, *Interdependence in the Post-Multilateral Era* makes a valuable contribution to the literature on international trade relations. The authors' effort to integrate a “micro” political/economic analysis of individual cases with a “macro” view of international trade relations marks an important direction in trade policy analysis. The particular strength of the book lies in its three trade policy case studies. Each of the authors has chosen an industrial sector that has been the subject of trade friction between the United States and the European Communities, and has analyzed the policies adopted by them in these areas in terms of their implications for U.S.-EC relations and, by extension, the international trading system. These studies are useful, and quite insightful, in describing the origins and dimensions of these trade disputes and the policies that have evolved in the United States and the European Communities to address them.

The book also offers a number of thought-provoking observations about the nature of trade and trade policy in the late 1980s. The authors implicitly recognize that although “industrial policy” remains a dirty word in U.S. government circles, U.S. trade policy is increasingly a sectoral policy, which observers from other countries have difficulty distinguishing from industrial policy. Because the “industrial policy” label has become associated in this country with notions of unfair trade and unacceptable levels of government intervention in the marketplace, the United States has tended to take an ad hoc, rather than a consciously coordinated, approach to microeconomic policy, with trade measures frequently forced to carry the burden of achieving essentially microeconomic policy goals when other measures would be more appropriate. However, the official U.S. government view remains that the role of trade policy is a limited one—to eliminate unfair trading practices, and occasionally to allow limited protection for domestic industries to permit them to adjust to foreign competition—and that trade policy should not properly be used as a tool to promote any particular form of, or direction for, economic development.

The European Communities, on the other hand, have been more forthright about employing whatever measures are deemed necessary (e.g., trade restrictions, subsidization, forced rationalization) to foster or preserve important industrial sectors. Trade policy in the Communities, then, is viewed as a subset of overall competition policy rather than as an independent

branch of policymaking with limited applications. When trade conflicts arise between the United States and the European Communities, the differences in their views regarding the proper role of trade policy in the overall policy process inevitably create difficulties in achieving a satisfactory resolution of any particular dispute.

Although few would quarrel with these observations, not all would agree with the authors' reasoning that this state of affairs precludes the possibility that the multilateral regime (GATT) can address trade problems outside the tariff area with any degree of effectiveness. One suspects that the authors were unduly influenced by the pundits and cynics of the day, and are overly skeptical as a consequence. The authors' pessimism may also derive from their focus on the differences in national policies that inhibit policy coordination, and a consequent tendency to overlook or minimize the importance of the areas of mutual interest that promote dispute resolution.

One consequence of this focus on the negative aspects of the cases examined is a tendency to offer criticisms that are not entirely justified. Particularly in the case study on steel, the book criticizes U.S. and EC trade policy actions without sufficient consideration of whether, under existing economic and political conditions, a particular action did or did not represent the best achievable alternative. Granted, there is room to criticize the woodenness of U.S. trade laws and the U.S. policy process, and one can easily paint a picture of a U.S. Government operating at the mercy of domestic steel interests to the detriment of the international trading system. However, this perspective fails to recognize that the solutions crafted in the steel case were designed not only to conform with U.S. obligations under the GATT, but also to take account of European economic and political realities. The trigger price mechanism (TPM) was, after all, designed to allow (often heavily subsidized) European producers to compete against the more efficient Japanese in the U.S. market, rather than subjecting them to the rigors of the U.S. countervailing duty law, a result that would have excluded certain EC producers from the U.S. market entirely. In this context, the study's criticisms of U.S. trade laws and of the details of administering the TPM obscure a central point, namely, the important areas of mutual interest that enabled the United States and the European Communities to reach agreement on measures to address the problem.

Similarly, the analysis of the telematics case would benefit from a more extensive focus on areas of mutual interest, as well as on problem areas. By looking narrowly at the issues surrounding deregulation of telecommunications markets, the study fails to take account of the growing recognition in both the United States and the European Communities that there are large areas of mutual U.S.-EC interest, not only in the telecommunications sector, but across the entire spectrum of electronics products and services, from semiconductors to computers, and from informatics to high-definition television. This growing awareness of common interests and of the need to avoid trade conflicts can be seen in a number of recent positive initiatives such as the U.S.-EC High Technology Working Group and the willingness of the European Communities to entertain comments on the EC Green Paper on telecommunications deregulation. These initiatives suggest that

there are strong undercurrents that could be channeled to promote policy coordination if the issues were properly conceptualized and packaged.

All of this, quite naturally, leads to a consideration of the multilateral system and GATT. The "macro" conclusions drawn by the authors regarding the implications of their analysis for the multilateral trading system are less compelling than the "micro" analysis of the individual case studies. In part, this is because insufficient attention is devoted to developing an overall framework to tie the case studies together, with the result that the book's conclusions and policy prescriptions come across as something of an afterthought.

It appears, moreover, that the standards by which the authors have evaluated prospects for managing trade conflicts multilaterally are unduly restrictive. The GATT system itself recognizes that free trade notions must often be modified to take account of the fundamental economic realities that frequently prevent the development of optimal trade policies. In a world in which sovereign nations are unprepared to cede control over their commercial policies, the GATT cannot realistically be expected to replace sovereign nations in their policymaking function. This does not, however, necessitate the conclusion that there is no useful role to be played by such a multilateral regime. The GATT can (and should) continue to play its traditional role as a forum for developing agreement on the ground rules for international trade and for arbitrating disputes regarding their application. (That interpretation and enforcement of the international rules must, of necessity, begin at the national level is not an argument for doing away with GATT.) Beyond its traditional role, the GATT can also continue to expand what has become (in the new Uruguay Round of negotiations in particular) its de facto function as a promoter of mutual interests and appropriate national trade policies. In this latter function lies the most promising direction for effective multilateral management of international trade relations in an increasingly complex world.

The most telling criticism of U.S. trade policy since the late 1960s and early 1970s is that the United States quite simply does not have one. The studies in this book help one to understand why. In this regard, they make an invaluable contribution to the effort to reconcile the "micro" view of industrial efforts to address foreign competition with the "macro" view of the appropriate role of trade in overall economic policy.

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Rechtliche Beschränkungen des Technologietransfers im Außenwirtschaftsverkehr.

By Klaus Wolfgang Ebert. Baden-Baden: Nomos Verlagsgesellschaft, 1986. Pp. 381. DM 87.

Although most German doctoral dissertations in fields such as law, medicine and economics are not published by a regular publishing house but are printed in upgraded mimeograph form at the candidate's expense, K. W.

Ebert's thesis, which was accepted by the University of Hamburg (I) Faculty of Law, was issued by the renowned publisher Nomos Verlagsgesellschaft.

The author's subject is the legal restrictions on the transfer of technology in foreign trade, primarily in German law. His last chapter, however, deals with the applicability of foreign embargo provisions to the business of German subsidiaries of U.S. corporations, and to German licensees of foreign licensors. The purpose of the book is to engage in a legal discussion of the *politically* motivated restrictions of recent years. Ebert focuses on the question whether, and if so, to what degree, the transfer of militarily important technology to states of the Warsaw Pact has been restricted. Another subject that interests the author is the restrictions concerning the transfer of nuclear technology for civil use to states that might employ resulting nuclear material in the construction of nuclear weapons. He also deals with restrictions that affect the transfer of technology to states whose political system the Federal Republic of Germany, and/or the United Nations, disapproves of; such restrictions may be designed to effectuate possible changes in these systems.

The author starts from the premise that the German economic and legal order, as a rule, entitles any person freely to transfer the technical know-how he possesses. He describes the exceptions provided by German law with respect to the international transfer of technology, including the possibilities of judicial review of the constitutionality of acts of state that may be invoked by the concerned persons and corporations. This approach is taken only to the law of the Federal Republic of Germany and excludes the regulations and administrative practice of the European Communities; of all other countries, the United States is mentioned merely in connection with the extraterritorial effects of U.S. law in Germany.

The book consists of six parts. The first part discusses the forms of technical knowledge and the factual and legal possibilities for its transfer. The second covers the reasons for, and the forms of restrictions on, the transfer of technology in the foreign trade law (*Außenwirtschaftsrecht*) of the Federal Republic of Germany. In the third chapter, the author deals with restrictions on transfer in cases he identifies by what he calls an absolute interest of secrecy. Here some provisions of the German penal code, and restrictions and limitations based on the patent law, are investigated.

A longer fourth chapter deals with the *Außenwirtschaftsgesetz* (AWG, foreign trade law) and discusses, in technical detail, the implementation of this statute with reference to the transfer of technology if the reasons for such restrictions are one or more of the *political* reasons mentioned above. Another long chapter discusses the rights of the concerned to sue in cases of legal or administrative restrictions for (1) revocation of the administrative act; (2) indemnification under patent law; and (3) indemnification under constitutional law (Art. 14 of the German Constitution, *Grundgesetz*). Finally, the last chapter deals with the extraterritoriality of transfer restrictions. The author discusses the problems of the evasion of embargoes, particularly by detours through third countries (*Umweghandel*). Here a short description of U.S. law, the NATO recommendations and a detailed presen-

tation of the German situation are offered. Then the admissibility of direct extraterritorial restrictions under international law is briefly examined. The two last subchapters deal with extraterritorial restrictions originating in the Federal Republic and directed against foreign enterprises, and with the reverse problem of the applicability of foreign embargo provisions on German corporations. It is here that some decisions of the German Supreme Court (Bundesgerichtshof) of 1960 and 1962 and an older decision of the Reichsgericht are discussed. In his summary, the author again cites the principle of territoriality, which invalidates many attempts to influence foreign enterprises by embargo provisions. Moreover, the author makes the point that many such provisions have little practical effect.

The book may serve as an introduction to the legal problems of embargo provisions. It presents the principles and offers, in this respect, not much new material. The Anglo-American reader will expect more case material. The book makes useful suggestions on the interpretation of the German foreign trade law with regard to embargoes.

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La inversión directa en el régimen de las inversiones extranjeras. By María Concepción Pablo-Romero Gil-Delgado. Pamplona: Ediciones Universidad de Navarra, S.A., 1986. Pp. ix, 214.

Ms. María Concepción Pablo-Romero Gil-Delgado, in her Spanish-language work, "Direct Investment within the Ambit of Foreign Investment Laws," takes on a subject of great practical importance in many countries and special significance in the country where her book was published, Spain. Spain joined the European Economic Community on January 1, 1986. Membership has meant that Spain must adjust many of its laws, including its foreign investment laws, to Community norms during the transitional period that terminates on January 1, 1992. The need to adjust implies changes in the laws that rule both investments made by foreigners in Spain and investments that are made from Spain to other countries, both of which include the concept of direct investment. This book is not an attempt to tackle and analyze direct investment regimes throughout the world. In the author's words, it is an attempt to shed light on the concept of direct investment.

To achieve her purpose, the author selects a variety of countries that operate under different circumstances and summarizes their approach to legislation and control of direct investments. Her orientation is decidedly tilted toward the Spanish situation; almost half the book is dedicated to an analysis of Spanish legislation on direct investment. That, however, does not prevent her from presenting a balanced and scholarly work.

Pablo-Romero begins her study with a survey of economic theory concerning investments and their definition. On the macroeconomic level, an investment is considered to be an increase in the totality of capital goods, a "real investment." On the financial level, an investment is the application of

accumulated savings in the hopes of obtaining a profit. Of course, the author notes, a financial investment can be a real investment. The interplay of these two points is returned to when analyzing specific laws.

The author provides a short history of foreign investment; how it evolved from mainly long-term projects to an increase in short-term movements of capital. She then investigates the factors that influence a country's position with regard to direct investments from abroad and foreign investments in general. She mentions the political situation (i.e., degree of stability) and balance of payments as factors that influence the way a country regulates its foreign investments. Especially important for her is economic development. She states that the latter perhaps is the main reason a country would take a restrictive position with regard to foreign investment.

Other economic factors also affect the foreign investment regime of a country. Countries that export capital do so for different reasons from those of countries that import it. Countries are exporters of capital, according to the author, because they must maintain or expand markets. These actions, of course, carry with them the corresponding risks: poor communications because of long distances, together with increased expenses and possible political risks.

Countries import capital because of the favorable effects on their balance of payments. It enables them to import technology and achieve commercial balance. Recurrent mention is made of the negative effects of capital importation such as the risk of economic interdependence to the point of weakening the economic policy of the government, inflation, the shutting down of weak national industries or businesses, and a sense of loss of sovereignty when foreign investors control certain aspects of the national wealth. The negative effects are the reasons, according to the author, that countries have foreign investment laws. The laws are designed, she writes, to prevent the fearful situation of "economic colonialism." These laws control more what goes on in a country than what goes on outside it because of the obvious limits on the application of domestic laws abroad.

Pablo-Romero uses the experiences of several of the countries in the Andean Common Market, Mexico and Argentina to support her argument concerning economic colonialism. It is not so clear that her argument is as accurate with regard to the European countries, whose foreign investment laws she reviews, especially those of France, Italy and the Common Market regime in general. Portugal and Spain, on the other hand, depending on the specific point in time, could be said to be "subjects" of economic colonialism.

The author believes that countries receiving capital from abroad "are conscious of its advantages and disadvantages and they establish legislative bases that permit the foreign capital to aid, within the legal order, their economic development." She chooses to review European and Latin American countries with foreign investment regimes because of their geographic and historical connection with Spain. She examines the foreign investment law of Portugal because its situation is similar to that of Spain. It also is a country trying to adapt its legal regime to that of the EEC.

There are, of course, basic differences between the Community countries and the Latin American countries that influence their foreign investment regimes. The author lists the differences that she finds the most significant: in general, the EEC countries are both importers and exporters of capital, while those of Latin America are mainly importers; the EEC countries are more stable politically than those of Latin America; and, finally, except for Portugal, the EEC countries are economically autonomous, while such autonomy does not exist in Latin America. She finds the Spanish situation to be in the middle; somewhere between a full member of the EEC and a Latin American nation.

In her overview of each foreign investment law, Pablo-Romero begins by signaling its main purpose. After a detailed analysis, she summarizes the most important points developed from her analysis. For the author, four things are to be emphasized in the study of direct investment legislation: the breadth allowed for direct investments in the various economic sectors of the country, the legal and physical persons who may make the investment, the types of capital admitted and the system of control. These points are addressed in her discussion of the various foreign investment laws, which is systematic, detailed and amply reinforced by references to scholarly works and official publications. It is interesting to discover through her research, for example, that the drafters of the Andean Foreign Investment Code, whose purpose is to assure the development of the national private sector and limit foreign influence, are often "the representatives of foreign capital in their own country."

Countries of the EEC are concerned, as exporters of capital, that their citizens' investments be protected. This is done, she says, by relying on the internal law of the foreign country and reinforcing those guarantees with treaties. At the same time, the EEC countries are also concerned with domination and control of their national economy.

From her study of the Latin American and European regimes, the author derives her own definition of a direct investment: an entrepreneurial investment in which the investor engages in an entrepreneurial activity, whether derived from ownership of the business assets or from control of the business activity that is the target of the investment. Control can exist because the investor has a majority of the capital of the business or because the target is a subsidiary that together with its parent forms an economic group.

With this definition in hand, the author undertakes a comprehensive study of Spanish legislation on direct investment. She provides a historical background of Spanish law regarding foreign investment. Legal, social and political influences are touched upon. Then the author takes up the present (1986) legislation in Spain, analyzing the main features of the law and its regulation. Her analysis is complete, ranging from an investor's access to the various Spanish markets and Spanish investments abroad, to classification of the type of investments and the intricate aspects of management and control with regard to indirect investments. She says that the Spanish foreign investment system is based on control, limiting access to certain markets such

as mining, banking and insurance. Spanish investments abroad are regulated to make Spanish products competitive with other products in the market.

Pablo-Romero ends her analysis of the concept of direct investment in Spanish law by comparing it to EEC law. The comparison serves a useful purpose in that the year the book was published was the first year of Spanish membership in the Common Market. It provides a bridge to an analysis of the new laws on foreign investment that Spain has passed since 1986 in an attempt to adjust Spanish legislation to Community norms. These new laws greatly change the legal landscape of foreign investments in Spain and Spanish investments abroad. One hopes that Pablo-Romero will at some future date extend her excellent analysis to include the new law.

JOSÉ DE LA ROSA

Of the Madrid Bar

RICK SILBERSTEIN

Of the California Bar

Régimen jurídico de las inversiones extranjeras en los países de la ALADI. Edited by Mirta Noemí Levis. Buenos Aires: Instituto para la Integración de América Latina, Banco Interamericano de Desarrollo, 1985. 9 binders. \$50/set; \$8/binder.

Since World War II, foreign investment seeking to enter Latin America has encountered many obstacles. The most formidable barrier was the xenophobia of the foreign investment laws of the investment-receiving nations. A minor, but not inconsequential, deterrent was the absence of a readily available, up-to-date, bilingual compendium of those laws. Presumably, commercial publishers considered that the market for such a publication was too small, or, more specifically, that existing and prospective investments were too concentrated, by industry or nation, to support a loose-leaf service covering all industrial sectors of every nation.

In the 1970s the Institute for the Integration of Latin America (INTAL), a division of the Inter-American Development Bank, took commendable first steps toward correcting that omission with the publication of loose-leaf collections of Latin American laws governing foreign investment¹ and the transnational licensing of technology.² The work here reviewed (hereinafter *Inversiones*) is the first revision of INTAL's 1976 collection of foreign investment laws. INTAL has separately revised, in a format similar to that of *Inversiones*, its 1977 collection of technology-licensing laws.³

¹ INSTITUTO PARA LA INTEGRACIÓN DE AMÉRICA LATINA, BANCO INTERAMERICANO DE DESARROLLO, RÉGIMEN DE LAS INVERSIONES EXTRANJERAS EN LOS PAÍSES DE LA ALALC (1976).

² INSTITUTO PARA LA INTEGRACIÓN DE AMÉRICA LATINA, BANCO INTERAMERICANO DE DESARROLLO, RÉGIMEN DE LA TRANSFERENCIA DE TECNOLOGÍA EN LOS PAÍSES DE AMÉRICA LATINA (1977).

³ INSTITUTO PARA LA INTEGRACIÓN DE AMÉRICA LATINA, BANCO INTERAMERICANO DE DESARROLLO, RÉGIMEN JURÍDICO DE LA TRANSFERENCIA DE TECNOLOGÍA EN LOS PAÍSES DE LA ALADI (1986).

Inversiones consists of nine loose-leaf paperback binders containing the foreign investment norms of the 11 nations that constitute the Asociación Latinoamericana de Integración (ALADI).⁴ For six of the ALADI nations (Argentina, Brazil, Chile, Mexico, Paraguay and Uruguay), those norms are expressed only in national legislation. For the remaining five (Bolivia, Colombia, Ecuador, Peru and Venezuela), which belong to the Andean Common Market (ANCOM), the norms also include ANCOM undertakings pursuant to the Treaty of Cartagena, notably Decision 24,⁵ by which the ANCOM nations agreed to impose specific minimum restrictions on foreign capital.

Subject to that difference, the national presentations of *Inversiones* are usefully uniform. The foreign investment rules of each nation are divided into (1) "Basic Norms" (general legislative and regulatory requirements), (2) "Procedural Norms" (administrative provisions, including helpful reproductions of application forms), (3) "Sectoral Norms" (restrictions on foreign investment in particular industrial sectors) and (4) "International Agreements" (investment-related treaties such as those that support programs of the Overseas Private Investment Corporation (OPIC), the International Centre for Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA)).

Classifying foreign investment norms into those standard categories highlights the idiosyncracies of the ALADI nations, sustaining the truism that Latin America is not a homogeneous entity but a propinquity of diverse peoples. Legislation of the ANCOM nations, to be sure, reflects the obligatory uniformities of Decision 24; and nearly all the ALADI nations declare certain industrial sectors—chiefly oil and gas, mining, finance, nuclear energy and domestic transport—off limits to foreign enterprise. But within those similarities, differences abound. Mexico's foreign investment statute⁶ is the most immutable of them all, with policy variations reflected not in subsequent decrees but by General Resolutions of the Mexican Foreign Investment Commission. Argentina and Brazil are conspicuous for legislative meticulousness concerning taxes and exchange controls. Paraguay takes pains to forbid foreign equity in sugar cane and alcohol, as do Bolivia and Mexico in forestry, Brazil and Colombia in publishing and news media, Venezuela in the dehydration of milk and Peru in the production of anchovy flour and oil, and the sale of cotton and rice. Even in legislative verbosity the ALADI members occupy a broad spectrum, the entire compilations varying from the 289 pages of changeful Brazil to the 40 of laconic Uruguay.

⁴ In English, Latin American Integration Association (LAIA); formerly, Asociación Latinoamericana de Libre Comercio (ALALC), or Latin American Free Trade Association (LAFTA).

⁵ Régimen común de tratamiento a los capitales extranjeros y sobre marcas, patentes, licencias y regalías, adopted Dec. 31, 1970, reproduced with amendments in *Eng. trans.* in 16 ILM 138 (1977).

⁶ Ley para promover la inversión mexicana y regular la inversión extranjera, Diario Oficial [D.O.], Mar. 9, 1973, at 5.

It is particularly helpful that *Inversiones* appears in loose-leaf form with frequent supplements. Since *Inversiones* was first published, the ANCOM nations have made a historic reassessment of foreign enterprise. On May 11, 1987, they signed Decision 220,⁷ which abrogates Decision 24 and releases each ANCOM nation to deal with foreign investment essentially as it sees fit. In the history of foreign investment in Latin America that was an epochal event, the most significant counterxenophobic initiative since World War II. During the presidency of Miguel de la Madrid, Mexico has made more modest, but similarly oriented, changes, culminating on February 3, 1988, in the promulgation of a single, liberalized General Resolution.⁸ Those departures merit prompt and widespread publicity.

Inversiones is a needed and useful work. Dr. Levis and her national collaborators are to be congratulated on a painstaking and lucid presentation. Without misprizing their efforts in the least, two suggestions are offered for the enhancement of the publication.

The first suggestion is that in future loose-leaf supplements *Inversiones* take a closer look at the international agreements that support foreign investment in the ALADI nations. *Inversiones* shows their only adherents, as of September 1, 1987, to be Argentina (OPIC), Bolivia (OPIC), Chile (OPIC), Ecuador (OPIC), Paraguay (ICSID and a bilateral arrangement with France) and Uruguay (OPIC). As of July 1, 1987, however, a standard compilation reported such agreements in effect also with Brazil (OPIC) and Colombia (OPIC); included Ecuador as an adherent of ICSID and MIGA, and Paraguay as an adherent of OPIC; and listed Bolivia, Chile, Colombia and Uruguay as having signed, but not ratified, MIGA.⁹ Those and subsequent instances of adherence to international agreements confirm the current investment-receptive trend in Latin America, and deserve recognition.

The second suggestion is that the *Inversiones* materials be presented in English as well as in their native Spanish or Portuguese. A few years ago, that suggestion would have been the special pleading of a monolingual United States as the source of preponderant foreign investment in Latin America. Today, if the United States is a diminishing source of new foreign capital in Latin America, English is nevertheless the international commercial language of Japan and other investment sources that are economically positioned to take up the slack. Presenting Latin American investment laws to them in English would significantly increase the outreach of this valuable publication.

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⁷ Sustitución de las decisiones 24 y conexas sobre el régimen común de tratamiento a los capitales extranjeros y sobre marcas, patentes, licencias y regalías, Gaceta Oficial del Acuerdo de Cartagena, May 18, 1987, at 15.

⁸ D.O., Feb. 3, 1988, at 19.

⁹ INSTITUTE FOR TRANSNAT'L ARB., NEWS & NOTES, No. 3, July 1987.

Positive Sum: Improving North-South Negotiations. Edited by I. William Zartman. New Brunswick and Oxford: Transaction Books, 1987. Pp. 314. Index. \$29.95, cloth; \$14.95, paper.

I. William Zartman is a skillful, shrewd and sophisticated political scientist, an authority on Francophonic Africa who has progressively broadened the focus of his work to include the whole complex of issues implicated in North-South negotiations over the international economic system. He has also contributed to the substantial literature on the theory of negotiations.¹

This book stems from his dual interests. It is not simply another analytic or hortatory work on the substantive issues that make up the North-South agenda. Its focus rather is on the negotiating process itself, on the way in which the parties have packaged issues and organized themselves for bargaining in diverse arenas, and on the dynamics of those bargaining sessions. More specifically, its purpose is to test some 16 hypotheses about North-South negotiations that have emerged from earlier process-oriented studies such as Robert Rothstein's *Global Bargaining* (1979), Roger Hansen's *The "Global Negotiation" and Beyond* (1981) and the Commonwealth Group of Experts' *The North-South Dialogue: Making It Work* (1982). Among those hypotheses are the following:

(1) "Negotiation is bound to fail when the parties' definitions of the problem diverge."

(2) "When one side possesses primarily negative power (i.e. only veto power but no positive incentives or trade-offs for the other party), a mutually favorable outcome is unlikely and an unfavorable atmosphere prevails, making matters worse."

(3) "Global forums keep results low because of the need to pace the slowest member and combine all interests."

(4) "Specific functional negotiations are fruitful and mutually productive; global negotiations are not, because of the broad demands and the complex agenda."

(5) "Negotiations fail where demands of one side and the concessions of the other are imbalanced, and succeed only where equal trade-offs are possible."

(6) "Concessions are made by the party with the lowest tolerance for breakdown or conflict (critical-risk factor), which lies permanently on the Southern side."

(7) "In the absence of an ability to produce constraints (sticks), only rewards (carrots) or moral obligations can produce results for the South."

In addition to testing the various hypotheses, Zartman asked his authors to look "for other possible explanations of success and failure." Zartman recognizes in his analytically rich introduction that measuring success in

¹ I. W. ZARTMAN & M. BERMAN, *THE PRACTICAL NEGOTIATOR* (1982); and *THE NEGOTIATION PROCESS* (I. W. Zartman ed. 1978).

negotiations is a highly problematic enterprise because (1) the nature of the process dictates that, if an agreement is reached, there is no absolute winner or loser, and (2) "all judgments of negotiated outcomes are based on contingent benefits" (pp. 10-11). Evaluations attempted years later may be very different from those made immediately following negotiations. And even the former will be contingent since we can never be certain that outcomes were the result of the negotiations themselves rather than of exogenous factors. Nevertheless, Zartman plainly believes that useful, albeit provisional, judgments can be made by comparing results against opening positions, by taking seriously the parties' own assessment (if they sign, he presumes, each side must feel it is better off with than without an agreement) and by independently verifying their assessments.

The bulk of the book consists of eight cases, each with its own analyst, selected in light of the various elements in the hypotheses being tested. In order of appearance they are as follows: (1) the effort lasting from 1974 to 1979 to create a new commodities regime, the so-called Integrated Program; (2) the effort in the United Nations Committee of the Whole (the COW) from 1977 to 1980 to forge agreement in principle on the shape of a "New International Economic Order"; (3) the Third UN Conference on the Law of the Sea; (4) the effort from 1975 to 1979 to negotiate a new international wheat agreement; (5) the Third Multifibre Arrangement; (6) the World Administrative Radio Conference of 1979; (7) the Lomé Conventions; and (8) the debt negotiations of 1974-1980. Thus, they include global negotiations with broad and with relatively narrow agendas, regional negotiations with a broad agenda of redistributive issues and negotiations with a single, well-defined subject and a limited set of particularly concerned participants. Zartman contends that three (nos. 3, 6 and 7 above) can be characterized as "successful," two (the COW and the wheat negotiations) as "failures" and the remaining three as "mixed" in that, although an agreement was signed, "the benefits remain under dispute" (p. 11).

Though the essays vary considerably in subtlety and elegance, the authors employ a common set of perspectives and analytic categories. And all begin with

an appreciation of the essential nature of negotiation as a process of joint decision making that combines conflicting positions into a common outcome [where it is successful], a process in which each party is required to give something from its initial positions to attain an outcome that is mutually (although usually unequally) beneficial and is preferable to nonagreement, i.e. to unilateral attempts at a solution [p. 6].

In his concluding chapter, Zartman summarizes the salient features of most North-South negotiations and elaborates the lessons that he believes these studies yield. To close students of the negotiations, the features enumerated are familiar: southern participants tend to arrive with an inadequate technical grasp of the issues. The northerners, with their vastly greater infrastructure for research and reservoir of technically trained personnel, have an immense advantage here. Sensitivity to the disparity rein-

forces the South's tendency to distrust northern initiatives, to maintain hard positions and to rely on moral exhortation rather than on persuasive demonstrations of common interest in reaching agreements. But the northern countries have only occasionally attempted either to share information or otherwise to help their southern counterparts to compete on a level playing field; they have, moreover, frequently employed technical discourse to frustrate progress in the belief that any agreement genuinely responsive to southern interests would almost certainly injure northern ones. (The cases indicate that this view of North-South relations is particularly prominent among the largest northern states; several of the smaller ones have argued in favor of a much less rigid zero-sum perspective.)

Both sides work hard to achieve intrabloc unity. Particularly on the southern side, the demands of unity inhibit the sensitive adjustment of positions as negotiations unfold. In general, neither side exhibits much appreciation of the guides to effective negotiation elaborated in the scholarly literature. "The basis for any agreement," Zartman writes, "is a *formula*, a conscious attempt to arrive at a joint definition of the problem and the solution and to combine relevant portions of both parties' positions into a common justification of terms of trade" (p. 283). He sees the law of the sea negotiations as

a unique, almost-textbook case of building formulas. Negotiations began when the opening formula of "extended underwater national resource jurisdiction in exchange for narrow territorial sea plus rights of passage" became understood. Discussions then proceeded to devise formulas for the various issue areas covered in the negotiations. The most crucial of them was the imaginative bridging of the competing redistributive and equity formulas for deep-sea mining [p. 284].

Successful formula building requires the identification of potential trade-offs. Since in many issue areas the South is short of items to trade, the conventional wisdom favoring narrowly focused discussions needs qualification. "Almost every one of the case studies," as Zartman reads them, demonstrates "unexploited possibilities of trade-offs, inducements, benefit sharing, compensations on details, and even procedural institutional concessions to make changes appear less threatening that dragged down the search for a productive agreement" (p. 285).

Another key to successful negotiations—above all, where the preconditions for a fundamental change of regimes (new power configurations, new consensus on goals and/or new possibilities opened up by new knowledge) are absent, as in the case to date of North-South relations—is for the party seeking change to accept the virtues or at least the inevitability of *incrementalism*, in terms of both substance and participants, if there is to be progress. The South must, in other words, be willing to find success in small adjustments in the distributive structure and must not allow its negotiating position to be hostage to the interest in maintaining a common front. The North, for its part, should be far more generous in sharing informational resources or in assisting the South in developing resources of its own. And both should recognize the virtues of a mediator, not excluding one with

links to the North but with an institutional interest in successful negotiations (the Commission for the European Communities played a sort of mediatory rôle in the Lomé negotiations).

All of these ideas make a great deal of sense. But would their adoption in the various cases have produced very different results? The authors of the eight studies focus on process. They do not attempt to pursue the admittedly very difficult question of to what extent, if any, a different outcome would have better served the interests of the North, or would at least have helped the South without actual detriment to its negotiating partner. The deep assumption of this volume is that latent in present conditions are adjustments in the structure of international economic relations that, if negotiated into being, would serve northern as well as southern interests better than the status quo. Intuitively, I believe Zartman and his colleagues are right. Despite its virtues, this volume does not provide systematic support for that belief.

TOM J. FARER
Board of Editors

Ein Dritter Weg für die Dritte Welt? Nachholende Nationenbildung im Schnittpunkt entwicklungspolitischer und hegemonialer Interessen. By Manfred Wöhlcke. Baden-Baden: Nomos Verlagsgesellschaft, 1985. Pp. 254. DM 29.

Will Third World nations have to take the capitalist market-oriented route or the socialist road in order to catch up on development, or is there a "third road" to nation building and development? This question cannot be easily separated from the question whether there ought to be a "third road" and in whose security interest it would be.

Considering both the elusiveness of a concept like the "third road" and the heterogeneous nature of the group of states labeled the "Third World," any attempt to give an answer to this question in general and prescriptive terms is an ambitious undertaking. At the end of Manfred Wöhlcke's book, here under review, the author pleads for a better understanding on the part of Western nations of those countries that have opted for a "third road" to nation building and development (p. 156a). The book is an important attempt at what one could call "consciousness-raising" and "conscience-raising" with regard to the pitfalls of a worldview that either allows for no alternatives to bloc loyalty or is blind to the potential for innovation in the Third World. Wöhlcke's intention is to clarify whether and to what extent, without endangering the security interests of the West, a "third road" is politically conceivable as a development alternative (p. 13).

In the first two chapters (pp. 29-108), Wöhlcke takes issue with the theory of modernization and gives, instead of an analytical definition, what he calls a "synoptical portrayal" of the concept of the "third road." He illustrates the concept by reference to the policy programs of a select group of Third World states and is generally less concerned with empirically tested hard facts and their analysis than with exploring the meaning of policies and strategies, revealing the "third road" as a new world concept of the intellec-

tual superstructure of modern international relations. Wöhlcke distinguishes several dimensions of the "third road." On the internal level, it is national integration and identity, and self-reliant development; on the level of external relations, it is national emancipation, nonalignment and socio-economic delinking, and regional economic cooperation (p. 25).

His concern is, and for this he relies on "empirical background knowledge" (p. 12), to improve the design for societal evolution. He points out that a dependent capitalist development model leads in most instances to structural heterogeneity and to a crippled economy; for support he draws largely from Dieter Senghaas's writings such as *Von Europa lernen. Entwicklungsgeschichtliche Betrachtungen* (1982). He then portrays the concept of the "third road" as a necessary alternative and corrective to the model of dependent capitalist development (p. 60). Its "leitmotif" is twofold: self-reliant participatory development (pp. 64 ff.), which requires internal structural reform, and, as the external corrective, South-South cooperation and regional integration, although Wöhlcke sees difficulties in realizing the latter.

All in all, Wöhlcke's design of a "third road" implies a new vision of the world that would allow the developing state more freedom in defining its development and alliance policies. Although Wöhlcke probably does not want to offer more than an impulse to rethinking international relations, it is urgently needed in the face of the fading debate on a new international economic order and the "global dialogue" that is gradually giving way to a "policy dialogue" on a bilateral or interregional level. The focus of the debate on development is more and more on the internal policy performance of the Third World state. The question of the "third road" is therefore a timely one and it includes the issue of "national integration and identity," which Wöhlcke treats in a separate chapter. Under the title "State and Nation" (pp. 83-108), Wöhlcke pleads for a balance between efficiency- and participation-criteria, if a strong and centralized state is not to be counterproductive with respect to development. His thoughts and ideas in this chapter are less persuasive than in the preceding chapters. One would have hoped that the dual nature of the developing state, which has been described amply in the past, would have been treated in greater depth. Still, the way in which Wöhlcke poses the question, "Is there a third road for the Third World?," will prompt the international lawyer into reconsidering the paradigm underlying his own approach to Third World issues in international law.

The main thesis of Wöhlcke's last chapter, on foreign policy and the security issue (pp. 109-56a), is that the pressure for development and emancipation in the Third World cannot be contained forever and that, therefore, channeling the pressure into a "third road" still acceptable to the West is preferable to a status quo policy (p. 149). To argue this point, he explains nonalignment as a strategy directed for historical-political reasons primarily against the West, which is often wrongly dramatized by Western observers as a political choice in favor of the Soviet Union. Wöhlcke suggests, however, that it may well be in the West's own security interest even to support, in certain cases, a shift from a dependent capitalist development

model towards a "third road" alternative, if revolutionary turmoil can thus be avoided (p. 154).

The bibliography in the appendix would have benefited from annotation and less arbitrary selection, though, with documents on Third World development theory and programming, one has to start somewhere. The book seems to have been written in haste: there is a reference to a chapter that does not exist, and the underlying theory could have been better streamlined. This does not, however, in any way diminish the importance and relevance of the book, which, one hopes, will attract a broad readership. A "third road" for the Third World is both a difficult and an ambitious undertaking, which will demand imagination and perseverance.

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Foreign Relations of the United States, 1952-1954. Volume VI: Western Europe and Canada. Parts 1 and 2. Washington: U.S. Govt. Printing Office, 1986. (Dept. of State Pubs. 9489 and 9490.) Pp. xlv, 2176. Index in part 2.

This volume, like others in the 1952-1954 *Foreign Relations* series, bridges the last year of the Truman administration and the early years of the Eisenhower presidency. A compilation of one thousand sequentially numbered documents, it is composed of two parts. Part 1 (pp. 1-1,137) focuses on U.S. multilateral diplomacy, especially the historic developments relating to European integration, as well as several meetings of American chiefs of mission stationed in Europe, and U.S. bilateral relations with the United Kingdom. Part 2 (pp. 1,139-2,144) continues documentation on bilateral relations with other European countries, the Vatican and Canada. This anthology does not encompass either U.S. relations with Germany and Austria, which are treated in considerable depth elsewhere,¹ or general economic and political matters, overall national security affairs and Western European security issues, which are treated in separate volumes.²

The documents provided in this compendium consist of the customary notes, telegrams, messages and memorandums (of summaries of conversations and statements "for the record"), together with letters, reports and other papers and diplomatic communications that flowed primarily within and among U.S. government agencies in Washington and between the Department of State and its missions abroad (including U.S. representatives to the North Atlantic Treaty Organization [NATO] and the European Coal and Steel Community). The documents also embrace other types of policy-making records and such special collections as presidential exchanges with

¹ See FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954. VOLUME VII: GERMANY AND AUSTRIA. Reviewed at 81 AJIL 994 (1987).

² For these, see FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954. Vols. I, II and V, reviewed, respectively, at 79 AJIL 857 (1985), *id.* at 1135 and 78 AJIL 1025 (1984).

Prime Minister Churchill, other European leaders and the Pope, and records pertaining to several bilateral summit and ministerial meetings.

Substantively, the initial segment of part 1 (pp. 1–635) constitutes the Department of State's impressive documentary contribution to U.S. encouragement of the second stage of the historic West European movement toward economic and political integration in the post–World War II era.³ Concerned not only with the launching of the European Coal and Steel Community (the treaty was ratified in 1952), it also deals with issues of economic (including agricultural), political and defense integration by means of treaties to “federalize” the “Community of Six” through the establishment of the European Defense Community and the European Political Community. These treaties, signed respectively in 1952 and 1953, were never ratified.

Specific matters relating to these developments involve the policies and positions of Belgium, Britain, Luxembourg, the Netherlands, Italy and France. These include such factors as the planning process, the principle of supranationality, organizational structure, memberships and observerships, headquarters sites, interrelations with other agencies (principally NATO and the Western European Union), treaty ratification and U.S. diplomatic representation. A possible “common market,” trade liberalization and balance of payments are also touched upon.

The next segment (pp. 636–92) contains agendas, chronological reports or minutes, and summaries of results for five meetings of selected U.S. chiefs of European missions (a practice begun by the Department of State in 1949). These sessions were convened to discuss East-West relations, the unity of Western Europe within the framework of the Atlantic Community, a West German contribution to European defense and U.S. economic and military assistance. They were attended by representatives of the Department of State and American emissaries to European countries, NATO and the European Coal and Steel Community. They were held in London, Luxembourg, Copenhagen, and again at London for American emissaries to Western Europe, and in Vienna for envoys to East European countries and Berlin.

The final segment of part 1 (pp. 693–1,137) concerns bilateral diplomacy with the United Kingdom and presents two types of materials. On the one hand, they deal with such substantive issues as U.S.-UK foreign policy coordination, Britain's relations with other European powers, Britain's role in European integration, atomic weapons tests, the NATO Atlantic Command, U.S. economic and military assistance, and various regional problems.

Other portions of this segment concentrate on top-level diplomacy (the Truman-Churchill meeting in Washington, January 5–18, 1952; the Eisen-

³ The first phase involved the establishment of the Council of Europe, the Brussels Pact, the Organization for European Economic Cooperation and the European Coal and Steel Community—foreshadowing the attempt to integrate the “Community of Six.” A later stage was characterized by the birth of the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM).

hower-Churchill meeting in Washington, June 25–29, 1954; Eisenhower's summit communications with the British Prime Minister) and ministerial visits (Secretary of State Acheson to London, February 13–19, 1952; Foreign Minister Eden to Washington, March 4–7, 1953; and Secretary Dulles to London, April 11–13, 1954). The documentation pertains both to preliminary negotiations and to the conduct and results of meetings, including "agreed minutes," joint declarations and public announcements.

Part 2, which continues documentation on U.S. bilateral diplomacy, consists of separate segments on France, Iceland, Ireland, Italy, Portugal, the Scandinavian countries, Spain and Canada. Information on relations with several other countries—namely, Greece, Luxembourg, the Netherlands, Switzerland, Turkey and West Germany—is interspersed without separate country-by-country treatment. Aside from the problems of integration, North Atlantic Alliance affairs and U.S. economic and military assistance, the principal topics dealt with are the following (countries at issue in parentheses): UN membership (Ireland, Italy and Spain); contributing to the defense of Europe (especially France); U.S. military bases and other facilities (Iceland, Spain and Portugal/Azores); neutrality in East-West affairs (Ireland, Sweden and Switzerland); consideration of an Export-Import Bank loan (France); and the role of a domestic Communist Party and the Trieste issue (Italy); as well as other categories designated simply as "relations with" individual countries. In addition, part 2 also provides materials on the summit visits to Washington by French Premiers René Mayer (March 1953) and Pierre Mendès-France (November 1954), and exchanges during September 1953 respecting a possible visit by Premier Joseph Laniel.

The final segment (pp. 2,022–144) is devoted to U.S. relations with Canada. One of the principal issues concerned the St. Lawrence Seaway and Power Project, which had previously been subscribed to by the President and the Canadian Prime Minister in an agreement in 1941, but had not been approved by Congress. When Canada decided to view the agreement as defunct and to proceed unilaterally with the project, revised authorization for the venture was negotiated and embodied in an exchange of notes, with the backing of the Wiley-Dondero Act, signed by the President on May 13, 1954.⁴ Specific aspects involved the development of water potential of the St. Lawrence River, construction responsibility, joint administrative machinery, cost allocations and tolls.

Other issues in Canadian-American affairs included the possibility of the outbreak of general war (resulting from the Korean War), joint defense arrangements and the actions of the Canadian-American Permanent Joint Board on Defense (established on the basis of the Ogdensburg Agreement of August 17, 1940), the use by the United States of bases in Canada, the polar electronic early warning system and such cooperative ventures as the Joint Canadian-U.S. Military Study Group, the Canada-U.S. Scientific Advisory Team and the creation of a Joint Economic and Trade Committee.

⁴ The 1941 agreement remained unapproved by Congress for more than a decade. President Eisenhower and Queen Elizabeth II participated in dedicating the St. Lawrence Seaway, at Montreal, in June 1959.

A small portion of part 2 (pp. 2,002–21) is devoted to the attempt to launch formal American diplomatic relations with the Vatican (which had existed from 1848 to 1864, when the United States commissioned *chargés d'affaires* and ministers to the Holy See). In 1951, to regularize the informal practice of commissioning Myron C. Taylor to serve as presidential special emissary during World War II and until 1949, President Truman nominated Mark Clark to be appointed as American ambassador. Because of congressional and public opposition, the nomination was withdrawn from the Senate in January 1952, at Clark's request.⁵ Documents concerning this development embody summit exchanges between the President (both Truman and Eisenhower) and Pope Pius XII, and commentary by Myron Taylor and others.⁶

Those interested in high-level U.S. policymaking and coordination will welcome the inclusion of National Security Council (NSC) papers embracing eight NSC "documents" (concerned with overall policy toward Iceland, Italy and Spain, and the Canadian-American early warning system, the St. Lawrence Seaway and North American continental defense) and six memorandums of council discussions prepared by NSC staff members. Other records of this type include several documents of the National Advisory Council, a National Intelligence Estimate on short-term development in French policy and a number of papers from or about the Operations Coordinating Board (of the NSC), the Joint Chiefs of Staff and the National Advisory Council on international monetary problems. This collection also embodies documentation pertaining to such agencies as the Economic Commission for Europe, the Export-Import Bank and the Economic Cooperation Administration and its successor agencies—the Mutual Security Agency and the Foreign Operations Administration.

In terms of selectivity, organization, treatment and content, this compendium characterizes the traditionally superior standards of the Office of the Historian of the Department of State in producing the *Foreign Relations* series, and is welcomed by all who are interested in the diplomatic relations of the United States in Western Europe during the early 1950s. To assist the user, its editors supplement the textual materials with a liberal supply of explanatory, descriptive and cross-referencing editorial notes and documentary footnotes. They also provide an inventory of some 325 abbreviations, symbols and acronyms, a 20-page catalog of persons with their official titles and ranks, a short list of official and unofficial published volumes including several key memoirs (those of Acheson, Eisenhower and Truman), a complete list of unpublished resources with their archival designations (which, in

⁵ For commentary on this matter, see review of *FOREIGN RELATIONS OF THE UNITED STATES, 1951. VOLUME IV: EUROPE: POLITICAL AND ECONOMIC DEVELOPMENTS*, 80 *AJIL* 772, especially at 774 (1986).

⁶ A practical temporary solution to the matter was worked out by means of unilateral representation in Washington by the Vatican's Apostolic Delegate. Eventually, formal diplomatic relations were regularized in 1984. Also, in addition to Woodrow Wilson's audience with the Pope in 1919, every President, beginning with Eisenhower, has had one or more such audiences during summit trips to Europe.

addition to the central files of the Department of State, were used to prepare this compilation) and a comprehensive, 30-page, double-columned index.

As in the past, under the supervision of William Z. Slany (Historian, Department of State), the editors brought to these volumes their high standards and considerable skill in coping with voluminous, complex and dispersed documentary resources, which they have distilled for the public domain in a compact, reliable and readily usable way.

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La Protezione dei beni culturali nel diritto internazionale. By Manlio Frigo. Milan: Dott. A. Giuffrè Editore, 1986. Pp. vii; 435. Author index. L. 28.000.

For readers who have an interest in the topic, this is an important book, a scholarly contribution to the literature on the international law of cultural property.¹ Frigo begins his study with a brief orienting discussion of the history of, and fundamental conceptions at work in, the international law of cultural property. He places special emphasis on the Italian experience, but since Italy has long been a major source nation (and, in ancient and Renaissance times, was a major importer), and since Italian cultural property law is more highly developed than other national schemes, the emphasis is more helpful than limiting.

In his second chapter, Frigo traces the development of the law protecting cultural property in war, culminating in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954.² Chapter III describes the legal framework of the protection of cultural property in peacetime and chapter IV deals with the illicit trade in, and the movement for "repatriation" of, cultural objects. Chapter V is a formal discussion, in the style of Italian legal science, of legal concepts in the field and would be of little interest to most readers. Chapter VI discusses private international law questions raised by the international traffic in cultural property.

¹ Other recent significant works include S. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE SURVEY* (1978); P. BATOR, *THE INTERNATIONAL TRADE IN ART* (1982), originally published as *An Essay on the International Trade in Art*, 34 *STAN. L. REV.* 275 (1982); the symposium on International Art Law in 15 *N.Y.U. J. INT'L L. & POL.* 757 (1983); L. PROTT & P. O'KEEFE, *LAW AND THE CULTURAL HERITAGE. VOL. I: DISCOVERY AND EXCAVATION* (1984); R. FRAOUA, *LE TRAFIC ILLICITE DES BIENS CULTURELS ET LEUR RESTITUTION* (1985). Cf. Merryman with Elsen, *Hot Art: A Reexamination of the Illegal International Trade in Cultural Objects*, *J. ARTS MGMT. & L.*, No. 3, Fall 1982, at 5, reprinted in *THE PENAL PROTECTION OF WORKS OF ART 151* (S. Berman ed. 1983); Merryman, *Thinking about the Elgin Marbles*, 83 *MICH. L. REV.* 1880 (1985); Merryman, *Two Ways of Thinking about Cultural Property*, 80 *AJIL* 831 (1986); J. H. MERRYMAN & A. ELSÉN, *LAW, ETHICS AND THE VISUAL ARTS*, chs. 1 and 2 (2d ed. 1987).

² 249 UNTS 240.

I disagree with Frigo on a number of substantive matters: e.g., for employing the euphemism "protection" of cultural property when what is really meant is "retention"—i.e., prohibition of export; for inadequately distinguishing objects that can be moved about without damage or the loss of information, expressive power or beauty from objects that all would agree should be left in place; for accepting too easily the notion of a "national cultural patrimony" and its implications; but this is not the place for a debate with the author.³ Such differences are bound to exist in a field as highly charged politically and as conceptually and analytically underdeveloped as this one.

Despite these differences of outlook with the author, I think he has written an admirable book. Frigo's research is impressive—his footnotes contain treasures until now undiscovered. He explores questions in depth, exposing layers of meaning and difficulty. Like most Italian legal scholarship, the writing is complex, full of qualifiers and dependent clauses, in the pursuit of precision and nuance. The result is a rich discussion that illuminates interesting questions of law and policy affecting "the common cultural heritage of all mankind."⁴ This book is another good reason to learn to read Italian.

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Israel Yearbook on Human Rights. Volume 13, 1983. Edited by Yoram Dinstein. Published under the auspices of the Faculty of Law, Tel Aviv University. Pp. 374.

For the Western world, institutionalized international concern for the fate of the victims of human rights abuses dates from the end of the Second World War. Consequently, an Israeli journal on human rights is particularly appropriate to deal with such issues as war crimes and crimes against humanity, not to mention the more pervasive problems of racial discrimination and minority rights, and the more specifically local problems unique to the state of Israel. Even articles in the last category, such as Shabtai Rosenne's *Recognition of Israel by the Security Council in 1948*, could be of

³ The Fraoua book, cited in note 1 and generously (in my opinion, overgenerously) reviewed by Professor Nafziger in volume 80 of this *Journal* at p. 751, is a much worse offender. More a tract than a study, it attempts to establish that contemporary international law already imposes, or, if it does not, should impose, two kinds of obligations: (1) an obligation on other nations to recognize and enforce source-nation cultural property export restrictions, and (2) an obligation on foreign holders of cultural objects to "repatriate" them to their nations of origin. Although both theses are zealously advanced in UNESCO and other international forums by source nations, neither is or is likely soon to become a rule of international law. A mild form of the first thesis is the principal concern of the 1972 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 823 UNTS 231, reprinted in 10 ILM 289 (1971). Of the major market nations, only the United States and Canada have become parties. The second thesis has attracted even less international acceptance.

⁴ The quoted phrase occurs in the Preamble to the 1954 Hague Convention, *supra* note 2.

interest to non-Israeli readers who want to know more about the history of this period.

The lead article, by Professor Leo Gross, is a historical consideration of the failure of the United Nations to adopt a Code of Offences Against the Peace and Security of Mankind. Following the Second World War, the United Nations sought to criminalize the Nuremberg offenses, such as "genocide," in an international criminal code. In spite of the fact that a draft code was prepared by the International Law Commission (ILC) in 1954, this draft was shelved for 20 years pending UN adoption of a definition of "aggression." Also in 1954, the General Assembly established the order for the consideration of what were considered three interrelated topics: (1) the definition of aggression, (2) the Code of Offences, and (3) the creation of an international criminal court.

Subsequently, the 1974 UN definition of aggression was criticized by states as being insufficiently precise to be used in a code of offenses that sought to impose criminal penalties on a person who failed to disobey the orders of his own government. The ILC also took the position that the code would have to take into account new international crimes that were recognized as such after 1954. Gross sees this as an additional problem in achieving adoption of the code. He suggests that the prospective adoption and enforcement of a sweeping list of crimes suggests the eventual criminalization of international relations, fueling the already confrontational politics of the United Nations and dooming the prospects for a code.

Considering the parallel development of human rights law on the regional level and the empowerment of regional human rights courts in the Americas and in Europe to adjudicate responsibility for international crimes such as torture and "disappearances," these regional tribunals may be blazing the trail for the eventual acceptance of an international criminal court.

The article by Professor Yoram Dinstein on the *Laws of Land Warfare* is the latest in his series on the rules of international humanitarian law, which, given their didactic format, appear destined to be reissued as manuals for use by Israeli combatants.

This volume does not shrink from criticizing the Israeli Government. Judge Eli Nathan of the District Court of Jerusalem, in his article on *Israeli Civil Jurisdiction in the Administered Territories*, suggests that a set of 1969 Israeli Justice Ministry regulations, which prescribe that service of Israeli court documents be carried out in the "Administered Territories" (Judea and Samaria) by the same procedure applicable to the service of documents within Israel, violates the law of belligerent occupation. Nathan argues that an extension of civil jurisdiction constitutes an extension of sovereignty, and that the law of belligerent occupation (the fourth Geneva Convention and the fourth Hague Convention of 1907) provides that the belligerent occupant does not acquire sovereignty over occupied territory.

Both Professor Giorgio Sacerdoti and Eliezer Yapou deal with the rights of minorities. Mr. Yapou reviews the incorporation of human rights standards in the Italian-Yugoslav territorial accords following the Second World War to guarantee protection of the ethnic minorities. Professor Sacerdoti

compares the affirmative action programs on behalf of disadvantaged minority groups under the League of Nations and under the United Nations. The nondiscrimination clauses of current multilateral human rights treaties guarantee equality before the law, but Sacerdoti suggests that affirmative action programs are still necessary to achieve de facto equality.

His most provocative point deals with what he terms the "internal" dimension of the right of self-determination. He suggests that peoples seeking independence from colonial domination is the predominant, but not the sole, manifestation of this right. Since minorities can be considered as "peoples," he states that there is "slowly emerging at the international level" a claim for internal self-determination, which comprises the exercise of fundamental human rights and, in particular, the right to political participation within the larger state.

Some of the other articles in this volume that warrant mention are Nathan Lerner's review of the 15-year history of the UN Committee on the Elimination of Racial Discrimination, and Rowell Genn's survey of the limitations placed on the freedoms of expression and association in the European human rights system, in order to prevent and punish incitement to hatred and to restrict the activities of organizations that foster racial hatred.

On the subject of racial hatred, Stephen Roth, in his article entitled *Anti-Semitism and International Law*, points out a curious irony of history, viz. that anti-Semitism has reemerged in spite of the fact that the international human rights movement is a reaction to the atrocities committed against the Jews. Anti-Semitism, he maintains, has been ignored in international law, as compared with the number of international instruments that seek, for example, to outlaw other forms of discrimination such as apartheid.

Last, one should not fail to mention Justice Haim Cohn's elegantly written article, *On the Meaning of Human Dignity*, aptly defined as "the goal to which the rule of human rights law aspires." In a doubtless controversial defense of the right to suicide, Cohn eloquently defends an individual's right to decide when life is no longer worth living, arguing that human dignity is vindicated in the exercise of that choice.

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Israel Yearbook on Human Rights. Volume 14, 1984. Edited by Yoram Dinstein. Published under the auspices of the Faculty of Law, Tel Aviv University. Pp. 327.

This volume of the *Yearbook* is less satisfying to the non-Israeli reader than its predecessor. It deals with many of the same issues discussed in the earlier volume such as war crimes, racial discrimination and, again, an article that calls for recognition of the right to commit suicide. The lead piece, however, is excerpted from a speech given by the President of Israel, Chaim Herzog, entitled "Judaism, Law and Justice." Its tone has less to do with law and human rights than with a defense of Israel, exemplified by President

Herzog's claim to "represent a nation which gave to this world the concept of the Rule of Law." Israel's enemies are afflicted with "moral bankruptcy," which is "emphasized by the attitude of so many towards the people and country of Israel."

Three other articles seem to have little other purpose than to defend Israel's human rights record. Israel, as everyone knows and these authors point out, has been in an almost continuous state of hostility with its Arab neighbors since its creation in 1948. Consequently, a state of emergency has been in force since 1948 and official press censorship exists. Ze'ev Chafets, the director until 1982 of the Israel Government Press Office, in his article *Press and Government in Israel*, roundly defends the press freedom that exists in Israel.

Over 70 pages of this volume are devoted to an examination of administrative detention orders in Israel. The first of these two articles, entitled *The Judicial Review of Administrative Detention Orders in Israel*, by Professor Harold Rudolph of the University of Witwatersrand in Johannesburg, traces the history of this practice. Administrative detention was introduced by the British mandatory Government in 1945 and absorbed into Israeli law when independence was obtained in 1948, by means of the declaration of the state of emergency.

In 1979 the Israeli Parliament enacted a new set of emergency regulations that superseded the 1945 regulations. One of the most important changes in the new regulations was that the administrative detention order may only be issued by the Minister of Defense if an *objective* standard is satisfied to show that the detention is required for national security reasons. Previously, the grounds for detention were left to the *subjective* discretionary power of the military commander. These 1979 emergency regulations stipulate that administrative detention orders be subject to mandatory judicial review, and the District Court shall set aside a detention order if it is not proven that the detention was carried out for objective reasons of state security. Rudolph reviews the practice of the Israeli courts in this area and criticizes cases where the court has abdicated its responsibility, having appeared "unwilling to impose its views on the Israeli military authorities," and praises other decisions where the court has found a detention order not to be justified in law, and therefore ordered it set aside.

The second of the two articles is entitled *A Contemporary Model of Emergency Detention Law. An Assessment of the Israeli Law*, by Professor Shimon Shetreet of the Hebrew University. As expressed in the title of his article, Shetreet considers the 1979 Israeli Emergency Powers (Detention) Law a model law and in conformity with international human rights standards.

Another article that deals with controversial subject matter is Professor L. C. Green's *War Crimes, Extradition and Command Responsibility*. Green, of the University of Alberta, discusses, inter alia, the command responsibility of the Israeli military authorities for the Phalangist attack on the PLO refugee camps at Sabra and Chatila, Lebanon, in September 1982. The Phalangists, who massacred approximately three hundred inhabitants of these camps, were under the control of the Israeli military authorities, who

did not prevent the massacre, although they had reason to expect it would take place and did nothing to stop it once they learned that it was under way. An Israeli commander acknowledged that the Israeli military system "showed insensitivity" in its failure to act. An Israeli governmental Commission of Inquiry absolved Israel of "direct responsibility" for the atrocities. Green sets forth the case but offers no judgment of his own, deferentially concluding that "any disciplinary or punitive acts against individual members of the Israeli forces . . . will depend upon Israeli law."

Last, an excellent short piece that warrants mention is Professor Pieter van Dijk's article on *The Right to Development and Human Rights—A Matter of Equality and Priority*. Van Dijk suggests that the right to development should mean that on the national and international level a priority must be set "for combatting poverty and fulfilling basic needs." This priority in favor of the poorest countries is based upon the principle of solidarity, which together with the principles of freedom and equality underlie the concept of the "New International Economic Order." Van Dijk recognizes the difficulty in obtaining the consent of states to turn these moral obligations into legal ones.

CHRISTINA M. CERNA
Of the District of Columbia Bar

The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions. Edited by Howard S. Levie. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1987. Pp. xiii, 635. Index. Dfl.275; \$134; £100.

In 1977 the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted two Protocols to the nearly universally accepted 1949 Geneva Conventions.¹ Protocol I deals with the law applicable in international armed conflicts and builds upon and develops the law set forth in those Conventions, as well as in the fourth Hague Convention of 1907 and its annexed Regulations Respecting the Laws and Customs of War on Land and customary international law. Containing 102 articles and two annexes, Protocol I represents a major step in the development of the law of war and in the protection of the victims of war, both combatants and noncombatants. Protocol II deals with the law applicable in noninternational armed conflicts and builds upon the slim base of one article—Article 3—common to the four Geneva Conventions of 1949. Protocol II contains 28 articles designed to secure minimum standards of humanitarian treatment for all persons involved in or affected by civil wars or other noninternational armed conflicts within a state.

¹ The texts of the two Protocols can be found in UN Doc. A/32/144 (1977), Anns. I and II, reprinted in 16 ILM 1391 (Protocol I) and 1442 (Protocol II) (1977) and in 72 AJIL 457 (Protocol I) and 502 (Protocol II) (1978).

In this new book, Professor Levie does for Protocol II what, from 1979 to 1981, he did for Protocol I when he published a four-volume history of the 1974-1977 negotiations, entitled *Protection of War Victims*. His technique is to assemble all available materials from the official records of the conference, plus certain unpublished conference documents made available to him, and, dealing in turn with each provision of the Protocol, set forth all relevant documents chronologically, with editorial comment where necessary, so that the reader can follow the negotiation of any particular provision from the original proposals by the International Committee of the Red Cross to the finally adopted text. The result is a valuable, indeed almost indispensable, research tool for anyone concerned with the history of any provision of the Protocol and the views of those involved in its negotiation.

Levie's new volume on Protocol II is a timely arrival in view of the recent decision by the Reagan administration to seek advice and consent of the Senate to its ratification, but, unfortunately, in the view of this reviewer, not to seek ratification of Protocol I.² This compilation of negotiating history is most useful and understandable if used in conjunction with more narrative commentaries such as the *Commentary on the Additional Protocols* by the International Committee of the Red Cross (1987) and *New Rules for Victims of Armed Conflicts* by Bothe, Partsch and Solf (1982). Given the facts that Protocol II was negotiated in parallel with Protocol I and that its overly elaborate draft provisions were drastically pruned during the final session of the Diplomatic Conference, the conference documents set forth in Levie's book are occasionally inadequate by themselves to explain fully why changes were made. Nevertheless, any serious effort to interpret Protocol II would be virtually impossible without recourse to this book, which should become a standard reference work for scholars concerned with the law applicable to civil wars or to the protection of human rights.

GEORGE H. ALDRICH
Board of Editors

Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights. By Marc J. Bossuyt. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1987. Pp. xxvi, 851. Dfl.475; \$210; £167.50.

Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights. Vols. VI, VII and VIII. Council of Europe. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1985. Vol. VI: pp. xix, 298. \$66.50. Vol. VII: pp. xxxi, 354. \$75. Vol. VIII: pp. xix, 226. \$60. Index in each vol.

Publication of these two lengthy and expensive works is yet another indication of the coming of age of human rights as a separate discipline of

² See President Reagan's Message of Jan. 29, 1987, Transmitting Protocol II to the Senate, S. TREATY DOC. NO. 2, 100th Cong., 1st Sess. (1987), reprinted in 81 AJIL 910 (1987).

international law. As noted in an earlier review of a collection of the jurisprudence of the European Court and Commission on Human Rights,¹ the substantive content of international human rights in Europe is now extensive, and the European human rights machinery has addressed fundamental issues ranging from torture and arbitrary detention to more esoteric (if, nonetheless, important) examinations of the requirements of due process and fair trials. While the system of protection established under the International Covenant on Civil and Political Rights is only little more than a decade old, the Human Rights Committee is now beginning to arrive at significant interpretations of the Covenant's provisions through "general comments" under Article 40 of the Covenant, review and questioning of state parties' periodic reports under the same article and opinions issued in response to individual communications filed under the Optional Protocol to the Covenant.²

The different organizational approaches adopted in these two works are perhaps reflected in their titles: the "collected edition" of the European *travaux préparatoires* is a chronological collection of discussions in the various bodies that considered the European Convention and its first Protocol, while the "guide" to the Covenant contains an article-by-article summary of the relevant debates in the United Nations. The latter is by far the more helpful for practitioners, as it permits ready identification of the different positions taken by states on the same substantive issue at all stages of the drafting process.

Much of the *Guide* is drawn directly from UN documents, and its summaries are taken from an annotated text of the draft Covenant prepared by the Secretary-General for the General Assembly in 1955 (UN Doc. A/2929) and subsequent reports of the Assembly's Third Committee. Bossuyt has inserted specific references to the relevant summary records (which total over five thousand pages), including identification of the country that adopted a particular position. Discussions of each article are divided according to the major substantive points,³ and all references are further classified as "discussions" or "proposals-decisions." A good brief introduction to the methodology and organization of the *Guide* enables the reader to use it with a minimum of complication.

The bilingual (English and French) *Collected Edition* is much more difficult to use as an analytical aid, although its reproduction of debates in the order in which they occurred does offer a certain historical flavor that one cannot

¹ 79 AJIL 1108 (1985).

² While President Carter signed the Covenant and submitted it to the Senate for its advice and consent in 1978, the Reagan administration has regrettably refused to encourage its ratification pending a purported "review," which has now taken 7 years and has, in fact, been moribund for some time. Cf. U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATION? (R. Lillich ed. 1981).

³ For example, materials on Article 1 are organized under the headings of general debate, political principle or legal right, Charter provisions, all peoples and all nations, meaning of self-determination, permanent sovereignty over natural wealth and resources, obligations of all states and the problem of minorities.

appreciate as easily in the *Guide*. Unfortunately, an initially envisaged general index to the entire eight-volume set was abandoned; thus, the only indexes are found at the end of each volume and refer only to that volume. Most of the index entries refer to individual speakers, although broad references to various substantive rights are also included; there is no reference by number to the articles of the Convention as finally adopted.

Minor mistakes occur in both works, although they are not so numerous as to detract from the overall utility of the volumes. The European materials quoted in the *Collected Edition* would be undoubtedly difficult to consult directly (even in Strasbourg); the UN reports and summary records referenced in the *Guide* are more readily available in major depository libraries, although cross-references between the reports and the discussions collected in the summary records would be nearly impossible to find without substantial effort by an individual researcher.

The cost of both of these works—over \$200 for the *Guide* and several hundred dollars for all eight volumes of the *Collected Edition*—ensures that they will be purchased primarily by libraries, and the limited usefulness of the format found in the latter will lessen its attraction for all but the most specialized European or human rights collections. However, the Bossuyt volume is an important work, and the status of the International Covenant on Civil and Political Rights as the most widely ratified general human rights instrument should justify the *Guide*'s inclusion in serious international law collections. One wishes that a similar reference work for the International Covenant on Economic, Social and Cultural Rights were also available.

Even a cursory review of the debates summarized in the two works exposes the illusion that one can easily identify the "intent of the parties" with respect to an ambiguous treaty provision, and one should bear in mind that any *travaux préparatoires* are only supplementary means of interpretation, as confirmed in Article 32 of the Vienna Convention on the Law of Treaties. While this will not deter those with LEXIS, research assistants or junior associates at their disposal from ferreting out even the most obscure remark that might support a particular interpretive position, the availability of works such as the *Guide* and the *Collected Edition* does not obviate the need for sound legal reasoning and good faith when one seeks to implement human rights treaties.

HURST HANNUM

Of the District of Columbia Bar

The U.N. Decade for Women: Documents and Dialogue. By Arvonne S. Fraser. Boulder and London: Westview Press, 1987. Pp. xi, 235. Index. \$18.85.

This splendid book not only is a contribution to knowledge about the growing worldwide feminist movement, it adds to our understanding of the dynamics of international conferences held under the auspices of the United

Nations on subjects ranging from the environment to population. These conferences are marked by a high level of public interest and involvement in the proceedings, and have given rise to parallel informal gatherings of nongovernmental persons that have often been more noteworthy than the official conference itself.

As an active U.S. nongovernmental person, the author participated in the three conferences of the past decade dedicated to women's issues; this reviewer was a delegate to the first such gathering held in Mexico City in 1975. Following upon the recommendations of that conference, the UN General Assembly established the UN Decade for Women (1976-1985) and thus put women's issues on the international agenda. Indeed, the symbol of the UN Decade, the dove of peace with the women's sign and an equal sign in the body of the dove, was thereafter noted even in remote places of the less-developed world. Clearly, a new consciousness and confidence among women has emerged in many countries. Networks and organizations of women were spawned by the Decade's activities, and dialogue among them transcended national boundaries.

The First Women's Conference in Mexico City, which ran for 2 weeks, was the largest meeting in history to deal with women's concerns. Almost all UN members participated. At the same time, a parallel nongovernmental Tribune was held, which constituted a highly sophisticated lobby, aimed at influencing not only the outcome of the conference, but also national governments, the media and the public. Over six thousand women affiliated with a multiplicity of private organizations converged on Mexico City from all over the globe. The Tribune put out a daily newspaper and held 192 informal sessions. This gathering mobilized women worldwide in a more dramatic fashion than the official delegations and, despite its chaotic nature, it was the true source of a spreading feminist dialogue.

The conference adopted a "World Plan of Action" by consensus vote, with heavy emphasis on the needs of women in the developing world. The proceedings were marred by political resolutions introduced at a late stage, particularly those dealing with "Zionism is Racism" and opposition to apartheid in South Africa. These subjects were hardly germane to the feminist agenda, and their intrusion led to greater unity among the women as they sought to protect that agenda from extraneous issues.

By the time the next conference was held in Copenhagen, in 1980, the delegates included many women far more knowledgeable about dealing with the UN system and with governments. New international groups arose after the Mexico City conference, many of which sent participants to the nongovernmental forum held parallel to the conference, which registered over eight thousand people. The "Program of Action" adopted in Copenhagen was specific in content and concrete in scope. The 1979 Convention on the Elimination of All Forms of Discrimination Against Women was signed at a ceremony marking the opening of the conference. Unfortunately, political statements (referring to Zionism, apartheid and Palestinian women) were inserted in the international section of the Program of Action; as a result, on the document as a whole, the United States, Canada, Israel

and Australia cast negative votes. The national section was adopted by consensus.

The last half of the Decade for Women culminated in the 1985 Nairobi conference. The final report of the conference itself acknowledged the contribution of women's organizations and the shared understanding held by women worldwide on their agenda of concerns. At Nairobi, unlike at previous conferences, the nongovernmental forum preceded the official gathering; consequently, its determinations greatly influenced the final report. The host country, Kenya, desirous of a successful result, was able to have the phrase equating Zionism with racism eliminated from the final report. Nairobi was thus reported in the world press as a triumph. The report, entitled "Forward Looking Strategies for the Advancement of Women to the Year 2000," conveyed the progress made from a sense of the oppression of women, which marked Mexico City, to a new spirit of independence and hope, culminating in Nairobi.

Arvonne Fraser traces this extraordinary UN Decade with precision and a sense of achievement. Her book merits reading by all concerned with social progress on an international scale.

RITA E. HAUSER

Of the New York and District of Columbia Bars

The South African Quagmire: In Search of a Peaceful Path to Democratic Pluralism.

Edited by S. Prakash Sethi. Cambridge, Mass.: Ballinger Publishing Company, 1987. Pp. xvi, 444. \$29.95.

This is a collection of 37 essays by 41 authors, focused on the role of multinational corporations in South Africa and designed to "bring . . . together, for the first time, and in one place, the authoritative views of the spokespersons for major interest groups and political and public opinion" (p. xiii). The book is only partially successful in meeting this laudable goal. It would certainly be useful for those new to the question of whether American and other foreign firms should remain in South Africa. However, those more familiar with these issues will find only a few chapters with fresh insights and even much of that is outdated, considering the pace of events during the tense past 2 years in South Africa. Most of the essays were written in early 1986. Many, in fact, appeared in the spring and summer 1986 issues of *Business and Society Review*. Since that time a state of emergency has been reimposed, the major black opposition groups working for peaceful change have been banned and their leaders jailed, press censorship has increased and the white voters have turned increasingly to the most conservative candidates, including some who proudly display neo-Nazi symbols. Given these changes, the prospect for greater moderation on the part of the whites, which is the premise of so many of the essays, appears increasingly remote.

Another shortcoming of the book is its lack of balance. It is part of the Ballinger series *Business in a Global Environment* and has a distinctly pro-

business (and proinvestment) bias. The editor, S. Prakash Sethi, concludes in chapter 1 that American corporations should stay in South Africa, on the ground that economic boycotts "would end up hurting the United States and its companies without having much effect in bringing about desired changes in South Africa" (p. 15). In fact, he advocates that the United States increase its foreign aid to South Africa in order to help the white South Africans bear the "immense economic cost" necessary to achieve a "peaceful transition to a democratic post apartheid . . . South Africa." He finds U.S. foreign aid to South Africa, \$20 million in 1985, totally insufficient: "Even as guilt money, its pettiness is embarrassing if not deplorable" (p. 17). Sethi is, however, somewhat critical of the Sullivan code and, drawing upon the interesting study by Karen Paul (ch. 37), concludes that the "Sullivan principles reporting system [managed by Arthur D. Little, whose Reid Weedon, Jr., defends the reports in chapter 36] . . . is so flawed that one cannot state with a high degree of certainty that the data indeed purport to show what actually is occurring in those companies" (p. 23). Nevertheless, Sethi advocates that companies stay in South Africa and increase their pressures on the South African Government and their assistance to black workers and community support activities.

Curiously, neither Sethi's long introductory chapter nor any of the other articles mentions that in May 1985, Leon Sullivan, the author of the Sullivan principles, had warned companies that they had only 2 more years to demonstrate that corporate engagement in South Africa would bring about the end of apartheid. In May 1987, Sullivan made good on his warning, withdrew his leadership from the Sullivan principles program and advocated that U.S. companies withdraw.

Given the editor's strong personal bias, he should have taken special pains to be certain that the important voices and best arguments supporting disinvestment were well represented. Unfortunately, they are not: 19 authors favor and only 8 oppose continuing multinational investment. Moreover, virtually all of the authors are white. There are *no* black American leaders and only three black South Africans represented. Of those, Bishop Desmond Tutu favors disinvestment and economic sanctions (ch. 13), while Chief Mangosuthu Gatscha Buthelezi favors continued investment (ch. 14). The third black author, A. J. Thembela, Vice Rector for Academic Affairs and Research at the University of Zululand, is highly critical of the South African Government for its disgraceful underfunding of black education, but takes no position on whether U.S. firms should stay in South Africa (ch. 21). The figures supplied by Thembela leave little doubt that the gap between black and white education in South Africa remains enormous despite the assertion of the South African minister for black education (ch. 20) that the Government "has accepted the responsibility to offer effective education and to work purposefully toward equal education opportunities in the shortest possible time" (p. 227).

Sethi explains that he tried to get the views of the African National Congress, the Congress of South African Trade Unions and representatives of the black press in South Africa, but that "unfortunately, these efforts

were not successful because of limitations of time and the inability or unwillingness of the participants to prepare the necessary material" (p. xiv). This may be because Sethi's own credibility was never established within the urban black community in South Africa. Indeed, many of his contacts seem to have been made through an executive of an American oil company, a professor of political science at the Rand Afrikaans University, and the Deputy Consul-General of South Africa in New York (p. xv).

While it is sometimes very difficult to obtain contributions from black South Africans opposed to U.S. investments (because the security laws may subject them to detention for such advocacy), it is very easy to obtain contributions from leading black Americans who have been active here in the efforts to have U.S. companies disinvest. It is surprising that there are no articles by—or, apparently, even an attempt to obtain articles from—individuals such as Randall Robinson, head of TransAfrica and the Free South Africa Movement; members of the Congressional Black Caucus such as Congressmen Mickey Leland and Bill Gray; Roger Wilkins, Senior Fellow, Institute for Policy Studies; Mary Frances Berry, former member of the U.S. Civil Rights Commission; Willard Johnson, professor of political science at MIT; or Leon Sullivan himself. The absence of these and other voices from both countries makes this a far less balanced and useful book than it could have been.

Despite these reservations, several chapters do illuminate current prospects for change in South Africa and the role that American investment (or the absence thereof) might play in the future. Senator Nancy Kassebaum (ch. 3) has a balanced essay that ends with this important observation:

Arguments about disinvestment are less relevant than such questions as whether the United States should give greater recognition to the ANC, what initiatives we should press South Africa to take in the next six months to establish a modicum of trust on the black side, and how the United States can better present its political position to black South Africans [p. 52].

"A Democratic Blueprint for South Africa" (ch. 8), by Arend Lijphart and Diane R. Stanton of the University of California at San Diego, contains a number of interesting suggestions on how a postapartheid government might be structured, although Colin Eglin, leader of the opposition Progressive Federal Party in South Africa, despairs of the possibility for meaningful dialogue between blacks and whites in the near future (ch. 7). He notes that South Africa's State President, P. W. Botha, gave an encouraging speech to Parliament in January 1986, which seemed to commit the Government to power sharing, negotiations with black leaders, the restoration of black citizenship and the removal of the influx control system. But Eglin reports that "within a week, hopes were dashed" when Botha reprimanded his foreign minister "for suggesting that the consequence of the government's new policy was that a black South African could possibly become State President" (p. 87).

The essay by Patrick O'Meara and N. Brian Winchester of the African Studies Program at the University of Indiana (ch. 10) is particularly useful in

describing current realities: "Despite the escalating violence of the recent past it should not be forgotten that whites are still firmly in control in South Africa and they are unlikely to surrender their privileges easily" (p. 111). They warn "that the military and security forces could stage what they see as a preemptive coup d'état" (p. 113) and conclude, as do so many of the other authors, that the white majority must enter "into sincere negotiations with authentic black leaders over significant and meaningful political, economic and social transformation" (p. 119). But they caution that

[t]he willingness of the ANC to negotiate and co-exist with whites is predicated on a relatively speedy transfer of power. If this struggle is a protracted one, the more militant members of the leadership of the ANC may predominate, and given its radical orientation and links with the South African Communist Party, . . . a different scenario [would result]. . . . The tragedy of white South Africa is that it has not learned the Rhodesian lesson: that earlier, voluntary, negotiated settlement is much preferable to a later, rampant, maelstrom [p. 122].

Part II of the book, "An Overview and Historical Perspective," contains only two chapters. "The Legal Structure of the Apartheid State" (ch. 11) gives a very useful history of the role that law has played in sustaining apartheid, beginning not with the ascendancy to power in 1948 of the Afrikaner-dominated Nationalist Party, but rather with apartheid laws enacted in the 17th century. While noting that petty apartheid—minor segregation laws—has been relaxed in a number of areas, the authors, Lawrence Boule, dean of the University of Natal Law School and Jacky Julyan, a lecturer at Natal, observe that there has been no real relaxation in "the racially based political system. . . . The resolution of the apartheid predicament will ultimately be found not in state reform but in a political settlement" (p. 147).

The second chapter in part II is "The Religious Rationale of Racism," by Oliver Williams, professor of management at the University of Notre Dame. He examines the policies of the Dutch Reformed Church, whose white members, he notes, "are the power brokers of government policy in the Republic" (p. 154). Unfortunately, the Williams article, ending with "Prospects for Change," was written before the dramatic decision by the Dutch Reformed Church to renounce its previous position that the Bible sanctions white control of the inferior black.

The balance of the book (parts III–VIII) has a number of chapters debating the likely effectiveness of economic pressures, on the one hand, or increased corporate involvement in South Africa, on the other. Two of the best pieces supporting the continued investment of U.S. firms are by Herman Nickel (ch. 16), former U.S. Ambassador to South Africa, and Sal Marzulo (ch. 34), a manager in the Mobil Oil Corporation who has been a leader in the industry support group of Sullivan companies urging American firms to increase their contributions to black community development and black education.

Other chapters worth noting provide contrasting views on investment by two British authors (chs. 30 and 31) and interesting articles on the history of

U.S. church involvement in the antiapartheid campaign (chs. 25 and 26). "The Apartheid Debate on American Campuses," by Joseph Murphy, chancellor of the City University of New York (ch. 27), an article on actions taken by states and cities with respect to apartheid (ch. 28), and a review of the "social investing" movement where certain mutual funds have constructed South Africa-free portfolios (ch. 29) are also worthwhile.

There are two excellent articles on threats to freedom of the press in South Africa (chs. 23 and 24), by Anthony Heard, editor of the *Cape Times*, and by Harold Packendorf, editor of the Afrikaans *Die Vaderland*. John Barratt, director general of the South African Institute of International Affairs, has written an exceptionally thoughtful and balanced piece (ch. 19), "Can External Leverage Pressure South Africa?" Finally, Michael Sutcliffe, senior lecturer in the Department of Regional Planning, University of Natal (ch. 15), points out that it is extremely hard to determine just what black South Africans think about foreign investment. He discusses a series of recent surveys of black workers that point to different conclusions, each of which seems to suffer from important sampling bias and other errors.

While *The South African Quagmire* has rewarding chapters, it remains an incomplete and unbalanced treatment of the efficacy of the opposing approaches of constructive corporate involvement and disinvestment. Moreover, given recent events in South Africa, it is not clear whether either strategy can have much impact on that increasingly polarized and violent situation. The growing strength of the radical right among the white electorate and the suppression of moderate black opposition groups such as the United Democratic Front may mean that internal positions are hardening to the point where external economic influence will become marginal to the play of the terrible forces that are gathering but have not yet been unleashed in South Africa. If this occurs, the book will also become largely irrelevant as a guide to either public or private decision making in the United States.

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International Law and the Black Minority in the U.S. By Y. N. Kly. Atlanta: Clarity Press; Ottawa: Commoners' Publishing Society Inc., 1985. Pp. xxvi, 125.

Professor Y. N. Kly's *International Law and the Black Minority in the U.S.* will disturb and provoke many readers, minority and nonminority alike. Kly's book challenges pat assumptions about the inevitability of achieving racial harmony in U.S. society through traditional legal and political mechanisms, skepticism about the capacity of international law to effect change in the behavior of nations toward their own citizens, and the normal civic religion professing faith in the ideal that in the United States all men and women are created equal. *International Law and the Black Minority in the U.S.*, with its emphasis on international human rights law as a viable alternative for se-

curing as yet unsecured minority rights, represents an important contribution to the discourse of dissent articulated by a growing number of black and other minority intellectuals on the capacity of the legal and political system of the United States to effect a truly equal status for its national minorities.

Kly's sweeping critique of the past, present and future of U.S. race relations in the context of contemporary international human rights law is organized around two principal theoretical constructs: what he calls the U.S. view of collective rights (USVCR) as it concerns national minorities (most particularly the black minority), and the international law view of collective rights (ILVCR) of minorities. According to Kly, the USVCR emphasizes civil and individual rights of minorities and assumes their eventual assimilation or integration into the dominant national culture. The ILVCR, on the other hand, emphasizes official recognition of the legal and political existence of national minorities and the acceptance of "special measures" or affirmative action designed to enable the minority to attain a political, economic and social equal-status relationship with the majority (p. xxiii).

In elaborating the significance of these two constructs, Kly's book draws heavily on the work of Harvard Law School Professor Derrick Bell (Bell is cited no less than half a dozen times in this 150-page work) and his central thesis that the most significant political advances for American blacks have resulted from policies that had the effect of serving the interests and convenience of whites rather than remedying racial injustices against blacks (p. 75). Kly applies this thesis to the history of U.S. black-white relations to suggest that the U.S. minority rights system "treats its national minorities in a manner which often corresponds to the constituent elements of imperialism and colonialism: domination, exploitation, and inequality" (p. viii). Thus, the U.S. view of minority rights permits a system of domestic colonialism in violation of contemporary international human rights law, most particularly, the general legal principles embodied in Article 27 of the United Nations Covenant on Civil and Political Rights. This central text of international human rights law states: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language" (p. xxii).

Kly argues that Article 27 requires that a government grant official recognition to its national minorities and special measures for them. Until the United States accepts these two obligations, Kly asserts, the credibility of U.S. human rights foreign policy and solutions to the problems of blacks and other minorities in the United States will continue to be impeded.

Part 1 of Kly's book elaborates the international law concept of minority collective rights, citing Switzerland, a country with three national minorities, French, Italian and Romanche, spread out among the 25 cantons of the Swiss confederation, as an example of a modern Western state that has instituted effective minority protection institutions. Besides the concrete example of the multilingual Swiss state, Kly sketches a brief history of minority rights in Western state practice, beginning with the 17th and 18th

centuries, when a number of treaties between European countries incorporated clauses relating to the rights of religious minorities. This process continued and developed through the 19th and early 20th centuries, culminating in Article 27, "the essence," according to Kly, of the ILVCR (p. 36).

Part 2 analyzes the U.S. concept of collective rights of minorities and its divergence from the ILVCR. Kly's survey of the history of black-white relations in America is divided into four parts: the slavery period (1776-1865), Reconstruction (1868-1895), the apartheid period (1895-1960) and the era of Martin Luther King, Jr. (1960-1975). It leads him to conclude that there has never existed any clear-cut, legally articulated minority policy in the United States, certainly not one that would meet the requirements of official recognition and special measures mandated by Article 27 and international human rights law. Instead, Kly argues, the USVCR is "highly flexible and pragmatic" (p. 87), thus assuring that the "maxim that majority self-interest will prevail over minority rights is in no danger of becoming antiquated" (p. 49). Suggesting that legislative initiatives such as the 1964 and 1968 Civil Rights Acts were but "a pragmatic response intended merely to stave off further minority protest," Kly joins a growing chorus of black and other American intellectuals of color who have offered negative assessments of the civil rights movement of the recent past and of the prospects for improvements in race relations in the United States for the near future (see, for example, Derrick Bell's new book, *And We Are Not Saved* [1987]). Kly's unique contribution is to place the past, present and future of U.S. race relations within the broader context of international human rights law, thus permitting an assessment of the USVCR of minorities according to the evolving norms of a legal discourse on national minorities liberated from a history of "intentional enslavement, extermination and gross exploitation" (p. 92). Kly's strategic placement of the USVCR within the more widely accepted normative discourse of international human rights law provides not only an alternative vision of race relations in the United States, but also, even more importantly, an alternative *solution*. Kly's unique perspective is worthy of consideration and debate by minority and nonminority individuals alike, intrigued by the possibility that the rule of law is more likely to be discovered in universal declarations of human rights than in more parochial interpretations.

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Coping with Africa's Refugee Burden: A Time for Solutions. By Robert F. Gorman. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers; UNITAR, 1987. Pp. xiv, 206. Index. Dfl.80; \$35.50; £26.25.

This book deals with the thorny question of combining assistance to refugees with development efforts so as to enable the beneficiaries to become

self-sufficient. Such an approach is relevant for two categories of refugees: those who are able to return to their country of origin and must rebuild an existence there, and those who cannot be expected to return in the foreseeable future and thus should be helped to settle down in the country of asylum. In both cases the local population, infrastructure and environment are likely to be affected. The idea of going beyond assisting refugees in camps and making them self-sufficient is of relatively recent origin. Efforts to put it into practice have lately been hampered by the drought disasters that have struck much of Africa and, in particular, many of the countries with a sizable refugee population. This turn of events led to the provisional abandonment of long-term solutions in favor of immediate and massive disaster relief.

In the first chapter, the author relates the gradual emergence of the concept that refugee relief could be combined with development, which led to the first International Conference on Assistance of Refugees in Africa (ICARA I). The second chapter describes the various steps that led to ICARA II and provides a brief account of the conference itself. The third chapter describes the role of the various, mostly UN, agencies in the preparation and implementation of ICARA II and highlights some of the coordination problems that had to be faced and that sometimes continue to hamper efficient action. The fourth chapter deals with donor country response to ICARA II. It describes the internal difficulties faced by many of them, especially the United States and the Federal Republic of Germany, as well as the evolution of attitudes in other donors such as the United Kingdom, Japan and the European Economic Community. The fifth chapter relates the views and attitudes of the host countries and the problems many of them encounter in implementing development programs designed for refugees. Chapter 6 describes the roles of the nongovernmental organizations. Chapter 7 draws the balance of achievements and unresolved problems and provides some recommendations on how the latter could be handled.

The great merit of this study lies in the fact that it was written by someone with considerable inside knowledge of the workings of both donor and recipient countries and the various international institutions involved. It shows how the dichotomy between relief and development assistance is usually reflected in the organizational setup at both the national and the international levels. At the latter, as far as the United Nations is concerned, this dichotomy is compounded by the fact that one principal agency, the United Nations Development Programme, is headquartered in New York, whereas the other, the United Nations High Commissioner for Refugees, has its seat in Geneva. As a result, much time and impetus is lost because of friction between ministries and offices, to the detriment of the programs and those who are meant to benefit from them. In addition, chapter 5 shows how the drought disasters and consequent worldwide relief effort not only have distracted government agencies from giving much attention to development programs for refugees, but also have kept most important nongovernmental relief agencies completely out of such efforts as they were totally

absorbed by the ongoing emergency actions. Consequently, only a few minor agencies have become involved in development programs within the ICARA framework.

What might have been given more attention is the fact that drought, famine and man-made economic calamities have given rise to mass movements across international borders. The people involved have often become inextricably mixed up with refugee populations, which makes the sorting out of the latter, for purposes of repatriation and settlement projects, extremely hard in countries like Sudan and Ethiopia.

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BRIEFER NOTICES

Las Relaciones de cooperación para el desarrollo CEE-Estados ACP. By José Manuel Sobrino Heredia. (Santiago de Compostela: Universidad de Santiago de Compostela, 1985. Pp. 273.) This excellently documented book traces the history of the trade preferences agreed to by the European Economic Community in favor of a large number of states, mostly former European colonies. Professor Sobrino Heredia has produced a solid work. The historical account of the EEC's cooperation policy is thorough and complete, and the progress made from the timid "association" themes in the Treaty of Rome to the much more advanced ideas of economic cooperation embodied in the Lomé Conventions is well described and contrasted. The book starts with a general introduction to the European system of cooperation for economic development (ch. I). Chapter II contains a competent legal analysis of Article 238 and part IV of the EEC Treaty. In chapter III Sobrino Heredia analyzes the Lomé Conventions, both historically and substantively, with particular reference to the enlargement of the EEC in the 1970s. This chapter is perhaps the best in the book. While the approach is, in this reviewer's judgment, too generous to the Lomé process, the author exhibits knowledge and understanding of this complex area of international law. Chapter IV adds a much-needed commentary about the EEC cooperation policy in the light of the recent accession of Spain and Portugal. In the appendix, the author includes a brief analysis of the 1984 Lomé III Convention, which was signed when the book was already in print.

Perhaps a criticism of the book is its excessive emphasis on historical events to the detriment of economic and policy analysis. The main conceptual tension in the idea of economic cooperation is that between the antithetical purposes of political altruism and economic self-interest. The author discusses only marginally how this tension is dealt with by the Lomé process. In the author's defense, one should add that the willingness to deal overtly with moral and political issues is quite uncommon in current international legal scholarship.

The foregoing criticism, however, does not overshadow the merits of the book. This work is a major contribution to the Spanish legal literature on the EEC.

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The Teaching of Space Law Around the World. Edited by Stephen Gorove. ([L.Q.C. Lamar Society of International Law, Monograph Series No. 4, University of Mississippi Law Center, 1986.] Pp. 93. Index. \$26.) This short, but concentrated, book adds a new element to the growing field of space law. For lawyers, political scientists and commercial space specialists interested in designing and teaching a course on space law, it serves as a guide to some of the concepts, syllabuses and materials now being offered in courses in the United States, Canada, Eastern and Western Europe, Argentina, the Soviet Union and China. While doing so, it provides the user with a glance at the history of space law and the materials and writings available to the prospective student. The author has included contributions from some of the leading academic figures in space law, each describing his own institution's space law program.

The author is well equipped to compile such a book since the University of Mississippi Law School was a pioneer in offering a space law course as a regular part of its academic program. A comparison of the programs included in the book gives the reader a feel for the currently evolving nature of space law as an academic subject. For some, it is closely connected with air law; for others, it is a separate and distinct subject. Mention is made in a number of places of a 1932 article by Vladimir Mandl—referred to by some as the "father of space law"—in which he said that state sovereignty does not extend to outer space. The subject of jurisdiction and territorial rights in space is a theme throughout the programs.

Although one has to compile the bibliography oneself from each of the programs, the book is a rich source of bibliographical listings on space law. This, added to the variety of topics covered and the history and ideas presented, makes this a valuable book for anyone thinking of developing and teaching a course on space law.

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COLLECTED ESSAYS

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LEGITIMACY IN THE INTERNATIONAL SYSTEM

By Thomas M. Franck*

INTRODUCTION

The surprising thing about international law is that nations ever obey its strictures or carry out its mandates. This observation is made not to register optimism that the half-empty glass is also half full, but to draw attention to a pregnant phenomenon: that most states observe systemic rules much of the time in their relations with other states. That they should do so is much more interesting than, say, the fact that most citizens usually obey their nation's laws, because the international system is organized in a voluntarist fashion, supported by so little coercive authority. This unenforced rule system can obligate states to profess, if not always to manifest, a significant level of day-to-day compliance even, at times, when that is not in their short-term self-interest. The element or paradox attracts our attention and challenges us to investigate it, perhaps in the hope of discovering a theory that can illuminate more generally the occurrence of voluntary normative compliance and even yield a prescription for enhancing aspects of world order.

Before going further, however, it is necessary to enter a caveat. This essay attempts a study of why states obey laws in the absence of coercion. That is not the same quest as motivates the more familiar studies that investigate the sources of normative obligation.¹ The latter properly focus on the origins of rules—in treaties, custom, decisions of tribunals, *opinio juris*, state conduct, resolutions of international organizations, and so forth—to determine which sources, qua sources, are to be taken seriously, and how seriously to take them. Our object, on the other hand, is to determine why and under what circumstances a specific rule is obeyed. To be sure, the source of every rule—its *pedigree*, in the terminology of this essay—is one determinant of how strong its pull to compliance is likely to be. Pedigree, however, is far from being the only indicator of how seriously the rule will be taken, particularly if the rule conflicts with a state's perceived self-interest. Thus, other indicators are also a focus of this essay insofar as they determine the capacity of rules to affect state conduct.

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¹ See especially Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L L. 300 (1968).

This essay posits that, in a community organized around rules, compliance is secured—to whatever degree it *is*—at least in part by perception of a rule as legitimate by those to whom it is addressed. Their perception of legitimacy will vary in degree from rule to rule and time to time. It becomes a crucial factor, however, in the capacity of any rule to secure compliance when, as in the international system, there are no other compliance-inducing mechanisms.

Legitimacy is used here to mean that quality of a rule *which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process*. Right process includes the notion of valid sources but also encompasses literary, socio-anthropological and philosophical insights. The elements of right process that will be discussed below are identified as affecting decisively the degree to which any rule is perceived as legitimate.

I. WHY A QUEST FOR LEGITIMACY?

Why study the teleology of law? What are laws *for*? What causes obedience? Such basic questions are the meat and potatoes of jurisprudential inquiry. Any legal system worth taking seriously must address such fundamentals. J. L. Brierly has speculated that jurisprudence, nowadays, regards international law as no more than “an attorney’s mantle artfully displayed on the shoulders of arbitrary power” and “a decorous name for a convenience of the chancelleries.”² That seductive epigram captures the still-dominant Austinian positivists’ widespread cynicism towards the claim that the rules of the international system can be studied jurisprudentially.³

International lawyers have not taken this sort of marginalization lying down. However, their counterattack has been both feeble and misdirected, concentrating primarily on efforts to prove that international law is very similar to the positive law applicable within states.⁴ This strategy has not been intellectually convincing, nor can it be empirically sustained once divine and naturalist sources of law are discarded in favor of positivism.

That international “law” is not law in the positivist sense may be irrefutable but is also irrelevant. Whatever label is attached to it, the normative structure of the international system is perfectly capable of being studied with a view to generating a teleological jurisprudence. Indeed, international law is the *best* place to study some of the fundamental teleological issues that

² J. BRIERLY, *THE OUTLOOK FOR INTERNATIONAL LAW* 13 (1944) (quoting Sir Alfred Zimmern).

³ Austin believed that law was the enforced command of a sovereign to a subject. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832); see also Janis, *Jeremy Bentham and the Fashioning of “International Law,”* 78 AJIL 405, 410 (1984). This Austinian view has been widely shared by critics. See, however, H. L. A. HART, *THE CONCEPT OF LAW*, ch. 10 (1961); and Williams, *International Law and the Controversy Concerning the Word ‘Law,’* 22 BRIT. Y.B. INT’L L. 146 (1945).

⁴ For the best recent exposition of this view, see A. D’AMATO, *Is International Law Really Law?*, in *INTERNATIONAL LAW: PROCESS AND PROSPECT* 1 (1987).

arise not only in the international, but also in national legal systems. This makes it odd that it is not more frequently used as a field for investigation.

Up to a point, the Austinians are empirically right. The international system of states is fundamentally different from any national community of persons and of corporate entities. It is not helpful to ignore those differences or to cling to the reifying notion that states are "persons" analogous to the citizens of a nation. Some of the differences are of great potential interest. In a nation, Machiavelli noted, "there cannot be good laws where there are not good arms."⁵ In the international community, however, there are ample signs that rules unenforced by good arms are yet capable of obligating states and quite often even achieve habitual compliance. The Austinians, beginning with a defensible empirical observation about the difference between national laws and international rules, deduce from the difference that rules governing conduct which are not "law" in the positivist sense cannot usefully be studied as a system of community-based obligations. It is *this* deduction—not the empirical observation—which is wrong.

Indeed, it is precisely the curious paradox of obligation in the international rule system that should whet our speculative appetite, provoking the opening, not the closing, of jurisprudential inquiry. *Why should rules, unsupported by an effective structure of coercion comparable to a national police force, nevertheless elicit so much compliance, even against perceived self-interest, on the part of sovereign states?* Perhaps finding an answer to this question can help us to find a key to a better, yet realistic, world order. The answer, if there is one, may also incidentally prove useful in designing more widely obeyed, less coerced, laws for ordering the lives of our cities and states.

A series of events connected with the role of the U.S. Navy in protecting U.S.-flagged vessels in the Persian Gulf serves to illustrate the paradoxical phenomenon of uncoerced compliance in a situation where the rule conflicts with perceived self-interest. Early in 1988, the Department of Defense became aware of a ship approaching the gulf with a load of Chinese-made Silkworm missiles en route to Iran. The Department believed the successful delivery of these potent weapons would increase materially the danger to both protected and protecting U.S. ships in the region. It therefore argued for permission to intercept the delivery. The Department of State countered that such a search and seizure on the high seas, under the universally recognized rules of war and neutrality, would constitute aggressive blockade, an act tantamount to a declaration of war against Iran. In the event, the delivery ship and its cargo of missiles were allowed to pass. Deference to systemic rules had won out over tactical advantage in the internal struggle for control of U.S. policy.

Why should this have been so? In the absence of a world government and a global coercive power to enforce its laws, why did the U.S. Government, with its evident power to do as it wished, choose to "play by the rules" despite the considerable short-term strategic advantage to be gained by seizing the Silkworms before they could be delivered? Why did preeminent

⁵ N. MACHIAVELLI, *THE PRINCE* 71 (L. de Alvarez rev. ed. 1981).

American power defer to the rules of the sanctionless system? At least part of the answer to this question, quietly given by the State Department to the Department of Defense, is that the international rules of neutrality have attained a high degree of recognized legitimacy and must not be violated lightly. Specifically, they are well understood, enjoy a long pedigree and are part of a consistent framework of rules—the *jus in bello*—governing and restraining the use of force in conflicts. To violate a set of rules of such widely recognized legitimacy, the State Department argued, would transform the U.S. posture in the gulf from that of a neutral to one of belligerency. That could end Washington's role as an honest broker seeking to promote peace negotiations. It would also undermine the carefully crafted historic "rules of the game" applicable to wars, rules that are widely perceived to be in the interest of all states.

Such explanations for deferring to a rule in preference to taking a short-term advantage are the policymaker's equivalent of the philosopher's quest for a theory of legitimacy. Washington voluntarily chose to obey a rule in the Persian Gulf conflict. Yet it does not always obey all international rules. Some rules are harder to disobey—more persuasive in their pull to compliance—than others. This is known intuitively by the legions of Americans who deliberately underreport the dutiable price of goods purchased abroad, and by the aficionados who smuggle Cuban cigars into the country behind pocket handkerchiefs, but would not otherwise commit criminal fraud. That some rules *in themselves* seem to exert more pull to compliance than others is the starting point in the search for a theory of legitimacy.

The questions raised by such examples of obedience and disobedience, however, are more interesting when examined in the context of the international than of the national community. It is the voluntariness of international compliance that heightens the mystery and lures us with the possibility of discovery. Thus, while the Austinians are right in pointing to important differences between the place of law in national society and the place of rules in the society of nations, those differences do not justify the closing of the international rule system to jurisprudential inquiry.

Indeed, such inquiry into the international system ought to be aided by the insights developed by the study of national and subnational communities. Research into the teleology of national legal systems has led the way to a recognition of the role of legitimacy, as distinct from coercion, as the key to legal order and systematic obedience. While most students of national systems, except perhaps for a few utopians such as Foucault,⁶ agree with Machiavelli that governance requires *some* exercise of power by an elite supported by coercive force, few any longer believe the Austinians' claim that this necessary condition is also a sufficient one. Having reached this

⁶ Foucault rejects all notions of dominance, whether embodied in theories of sovereignty (divine rule, autocracy, "public rights" and so forth) or embraced in "mechanisms of discipline," including, for example, "power that is tied to scientific knowledge." He visualizes, instead, a new form of "right," which is antidisциплиinarian and divorced from concepts of sovereignty. M. FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS* 106-08 (C. Gordon ed. 1980).

conclusion, most students of law, power and structure in society have sought to identify other characteristics that conduce to the rule of law. Ronald Dworkin identifies three such characteristics: *fairness*, *justice* and *integrity* (the last being a principled, more sensitive variant of consistency).⁷ Jürgen Habermas emphasizes the role of discursive validation, following the tradition of Aeschylus and Aristotle.⁸ Important scholarship on contract theory has demonstrated that coercion need not be an essential element in ensuring the efficacy of a contract, which is more accurately seen as self-enforcing obligation.⁹ In fact, much recent work focusing on the phenomenon of obedience and obligation in national societies concerns itself primarily with noncoercive factors conducing to consensual compliance.

While some such studies have emphasized the role of strategic concepts that gain voluntary compliance by mutualizing advantage, others, beginning with the seminal work of Max Weber,¹⁰ have emphasized the role of *legitimacy* and *legitimation*. Weber's analysis stressed process legitimacy. He hypothesized that rules tend to achieve compliance when they, themselves, comply with secondary rules about how and by whom rules are to be made and interpreted. In his view, a sovereign's command is more likely to be obeyed if the subject perceives both the rule and the ruler as legitimate. Somewhat different concepts of legitimacy have been developed by Habermas¹¹ and by neo-Marxist philosophers.¹² Oscar Schachter, working in the field of international normativity, has elucidated and emphasized the

⁷ R. DWORKIN, *LAW'S EMPIRE* 176-224 (1986).

⁸ According to Habermas:

Legitimacy means that there are good arguments for a political order's claim to be recognized as right and just; a legitimate order deserves recognition. *Legitimacy means a political order's worthiness to be recognized.* This definition highlights the fact that legitimacy is a contestable validity claim; the stability of the order of domination (also) depends on its (at least) *de facto* recognition. Thus, historically as well as analytically, the concept is used above all in situations in which the legitimacy of an order is disputed, in which, as we say, legitimation problems arise. One side denies, the other asserts legitimacy. This is a *process* . . .

J. HABERMAS, *COMMUNICATION AND THE EVOLUTION OF SOCIETY* 178-79 (T. McCarthy trans. 1979).

⁹ Kronman, *Contract Law and the State of Nature*, 1 J. L., ECON. & ORG. 5 (1985).

¹⁰ Weber postulates the validity of an order in terms of its being regarded by the obeying public "as in some way obligatory or exemplary" for its members because, at least in part, it defines "a model" which is "binding" and to which the actions of others "will in fact conform." At least in part, this legitimacy is perceived as adhering to the authority issuing an order, as opposed to the qualities of legitimacy that inhere in an order itself. This distinction between *an* order (command) and *the* order (authority) is easily overlooked but fundamental. 1 M. WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 31 (G. Roth & C. Wittich eds. 1968). For a critique, see Hyde, *The Concept of Legitimacy in the Sociology of Law*, 1983 WIS. L. REV. 379.

¹¹ "What are accepted as reasons and have the power to produce consensus . . . depends on the level of justification required in a given situation." J. HABERMAS, *supra* note 8, at 183.

¹² Hyde, for example, believes that the concept of legitimacy should be abandoned and replaced by investigation of "rational grounds for action." Hyde, *supra* note 10, at 380. See also Bos, *Friede Durch Völkerrecht—Oder Durch Völkerlegitimität?*, 17 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 113 (1970).

role of "competence and authority" in endowing a rule with capacity to obligate.¹³ All have in common, however, their emphasis on noncoercive factors as conducing to rule-compliant behavior.

It thus appears that, despite its residual Austinian propensities, national jurisprudence has quite a bit to say to the international system precisely because there is empirical evidence that, in both systems, noncoercive factors play an important part in conducing to rule/law-compliant behavior. The special value to both national and international jurisprudential inquiry of studying the international system, however, lies in its unalloyed noncoercive state. While the dependence of the international system on voluntary compliance is often (and justly) perceived as a weakness, it happens to afford a singular opportunity. Critics of efforts to study legitimacy as a noncoercive factor conducing to compliance in national legal systems have been able to argue that this factor necessarily eludes researchers because it cannot be isolated from other, authoritarian, elements compelling obedience.¹⁴ That critique loses its force, however, in the international context. Thus, the operation of the noncoercive element, or, specifically, *legitimacy*, becomes easier to isolate and study in the interstate system than in societies of persons, where the coercive sovereign always lurks in the background.

Yet there is a stronger motivation for studying legitimacy in the international system than the academic objective of creating a bridge from national to international speculative jurisprudence. A teleology that makes legitimacy its hypothetical center envisages—for purposes of speculative inquiry—the possibility of an orderly community functioning by consent and validated obligation, rather than by coercion. This is surely the realistic approach to an international jurisprudential teleology: one that examines the objective properties of the global rule system so as to study whether and how it may advance or perfect itself in accordance with the propensities of those observable properties. That inquiry begins with the unexplained, yet evident, paradox that autonomous actors systematically engage in rule-determined conduct, not infrequently in the face of a strong countervailing desire to pursue realizable short-term gratification in violation of the rules.

Admittedly, the rule system of the community of states is far from perfected: absence of rules and disobedience continue to be important dissonant features. But it is too readily assumed that these deficiencies are attributable primarily to the lack of an Austinian sovereign with police powers. The weakness of this explanation is its failure to account for significant deviance: that many rules are obeyed much of the time. What if, instead, rule disobedience, or a rule void, were attributable—in whole or in part—not to the absence of coercive power to enforce the rules but to the perceived lack of legitimacy of the actual or proposed rules themselves and of the rule-making and rule-applying institutions of the international system? Put another way, perhaps failure to obey the rules can best be studied through a better understanding of its opposite: voluntary deference to them.

¹³ Schachter, *supra* note 1, at 309.

¹⁴ Hyde, *supra* note 10, at 411–17, 422–25.

That might be rather good news. Since the world is not about to create a global supersovereign with overriding enforcement powers, it might be encouraging to know that these are not the prerequisites of a developed, functioning international community. It would be even more helpful to know that the global system of rules could be further refined and developed, even in the absence of the Austinian factors, by augmenting the legitimacy of rules and institutions. It would spur the social imagination to realize that the creation of a global regime with enforcement power might only be the final culmination of a process capable of gradually perfecting the community, not the *sine qua non* for system building.

If such a noncoercive, or voluntarist, community were a reasonable goal of the study of legitimation, the resulting society of states would still not resemble the modern nation. In place of coercion, there is only the claim to compliance, based on social entitlement, which a legitimate rule makes on, and on behalf of, all members of the community. In this sense, the international community more closely resembles a membership club with house rules. Membership confers a desirable status, which is manifested when the members have internalized socially functional and status-rooted privileges and duties. Membership is reinforced by valid governance, shared experience, reciprocal gestures of deference and recognition, common rituals, mature common expectations and the successful pursuit of shared goals. Obedience to law, in contrast, at least in part is a recognition of the coercive power of the organized state.

In both the state and the voluntarist international system, obedience to commands is evidence of the existence of an organized community. The international community, however, does not closely resemble the modern state, precisely because the activist state exists to issue and enforce sovereign commands, while the more passive international community exists to legitimize, or withhold legitimacy from, institutions, rules and its members and their conduct. The legitimacy of a rule, or of a rule-making or rule-applying institution, is a function of the perception of those in the community concerned that the rule, or the institution, has come into being endowed with legitimacy: that is, in accordance with right process.

What "right process" means in practice is the subject of the remainder of this essay. Pursuing this line of inquiry, we will focus most of our attention on the legitimacy of *rules*, although attention will also have to be paid to the legitimacy of those institutions and processes through which the rules come into being. In our inquiry we will begin with the rules themselves: their literary structure, origins, internal consistency, reasonableness, utility in achieving stated ends and connection to the overall rule system, and the extent to which their origins and application comport with the international community's "rules about rules." It is the underlying hypothesis of this essay that rules, to varying degrees, contain the determining elements of their own legitimacy.

If legitimacy can be studied, it can also be deliberately nourished. There lies the practical rationale of this inquiry. Someday, perhaps, the international system will come to have law and legal institutions that mirror their

domestic counterparts. But that is not now, and it is not likely to be in the foreseeable future. H. L. A. Hart put it more gently: "though it is consistent with the usage of the last 150 years to use the expression 'law' here, the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions ha[s] inspired misgivings, at any rate in the breasts of legal theorists."¹⁵ Such misgivings, however, are not a cause for despair, nor should they be the end of the road of theoretical inquiry. On the contrary, the misgivings are valid but, for that very reason, are precisely the right starting point in the search for those elements which conduce to the growth of an orderly voluntarist international community and system of rules.

Four elements—the indicators of rule legitimacy in the community of states—are identified and studied in this essay. They are *determinacy*, *symbolic validation*, *coherence* and *adherence* (to a normative hierarchy). To the extent rules exhibit these properties, they appear to exert a strong pull on states to comply with their commands. To the extent these elements are not present, rules seem to be easier to avoid by a state tempted to pursue its short-term self-interest. This is not to say that the legitimacy of a rule can be deduced solely by counting how often it is obeyed or disobeyed. While its legitimacy may exert a powerful pull on state conduct, yet other pulls may be stronger in a particular circumstance. The chance to take a quick, decisive advantage may overcome the counterpull of even a highly legitimate rule. In such circumstances, legitimacy is indicated not by obedience, but by the discomfort disobedience induces in the violator. (Student demonstrations sometimes are a sensitive indicator of such discomfort.) The variable to watch is not compliance but the strength of the compliance pull, whether or not the rule achieves actual compliance in any one case.

Each rule has an inherent pull power that is independent of the circumstances in which it is exerted, and that varies from rule to rule. This pull power is its index of legitimacy. For example, the rule that makes it improper for one state to infiltrate spies into another state in the guise of diplomats is formally acknowledged by almost every state, yet it enjoys so low a degree of legitimacy as to exert virtually no pull towards compliance.¹⁶ As Schachter observes, "some 'laws,' though enacted properly, have so low a degree of probable compliance that they are treated as 'dead letters' and . . . some treaties, while properly concluded, are considered 'scraps of paper.'"¹⁷ By way of contrast, we have noted, the rules pertaining to belligerency and neutrality actually exerted a very high level of pull on Washington in connection with the Silkworm missile shipment in the Persian Gulf.

The study of legitimacy thus focuses on the inherent capacity of a rule to exert pressure on states to comply. This focus on the properties of rules, of course, is not a self-sufficient account of the socialization process. How rules

¹⁵ H. L. A. HART, *supra* note 3, at 209.

¹⁶ Permissible activities of diplomats are set out in Article 3 of the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 UST 3227, TIAS No. 7502, 500 UNTS 95. Obviously, these do not include espionage.

¹⁷ Schachter, *supra* note 1, at 311.

are made, interpreted and applied is part of a dynamic, expansive and complex set of social phenomena. That complexity can be approached, however, by beginning with the rules themselves. Those seemingly inert constructs are shaped by other, more dynamic forces and, like tree trunks and seashells, tell their own story about the winds and tides that become an experiential part of their shape and texture.

II. DETERMINACY AND LEGITIMACY

What determines the degree of legitimacy of any particular rule text or rule-making process? Or, to ask the same question another way: what observable characteristics of a rule or of a rule-making institution raise or lower the probability that its commands will be perceived to obligate? It is to such questions that the remainder of this analysis is addressed. One could approach the social phenomenon of noncoerced obedience directly, through such various openings as are afforded by the study of myths, game theory or contractarian notions of social compact. Instead, these and other socializing forces will be approached indirectly, through a unifying notion of *rule legitimacy*; that is, by approaching dynamic social forces through those rules which the society chooses to obey or to regard as obligatory. It should be borne in mind, however, that the norm-centered question—what is it about the properties of a rule that conduces to voluntary compliance?—is merely the lawyer's approach to larger sociological, anthropological and political questions: what conduces to the formation of communities and what induces members of a community to live by its rules?

Let us begin by examining the literary properties of the text itself that conduce to voluntary compliance or induce a sense of obligation in those to whom the rule is addressed.

Perhaps the most self-evident of all characteristics making for legitimacy is textual *determinacy*. What is meant by this is the ability of the text to convey a clear message, to appear transparent in the sense that one can see through the language to the meaning. Obviously, rules with a readily ascertainable meaning have a better chance than those that do not to regulate the conduct of those to whom the rule is addressed or exert a compliance pull on their policymaking process. Those addressed will know precisely what is expected of them, which is a necessary first step towards compliance.

To illustrate the point, let us compare two textual formulations defining the boundary of the underwater continental shelf. The 1958 Convention places the shelf at "a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."¹⁸ The 1982 Convention on the Law of the Sea, on the other hand, is far more detailed and specific. It defines the shelf as "the natural prolongation of . . . land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured," but takes into

¹⁸ Convention on the Continental Shelf, Art. 1, Apr. 29, 1958, 15 UST 471, TIAS No. 5578, 499 UNTS 311.

account such specific factors as "the thickness of sedimentary rocks" and imposes an outermost limit that "shall not exceed 100 nautical miles from the 2,500 metre isobath," which, in turn, is a line connecting the points where the waters are 2,500 meters deep.¹⁹ The 1982 standard, despite its complexity, is far more determinate than the elastic standard in the 1958 Convention, which, in a sense, established no rule at all. Back in 1958, the parties simply covered their differences and uncertainties with a formula, whose content was left in abeyance pending further work by negotiators, courts, and administrators and by the evolution of customary state practice.²⁰ The vagueness of the rule did permit a flexible response to further advances in technology, a benefit inherent in indeterminacy.

Indeterminacy, however, has costs. Indeterminate normative standards not only make it harder to know what conformity is expected, but also make it easier to justify noncompliance. Put conversely, the more determinate the standard, the more difficult it is to resist the pull of the rule to compliance and to justify noncompliance. Since few persons or states wish to be perceived as acting in obvious violation of a generally recognized rule of conduct, they may try to resolve the conflicts between the demands of a rule and their desire not to be fettered, by "interpreting" the rule permissively. A determinate rule is less elastic and thus less amenable to such evasive strategy than an indeterminate one.

A good example of this consequence of determinacy is afforded by the recent litigation between Nicaragua and the United States before the International Court of Justice. From the moment it became apparent that Nicaragua was preparing to sue the United States, State Department attorneys began to prepare the defense strategy. One option considered was invoking the "Connally reservation," which, as part of the U.S. acceptance of the jurisdiction of the International Court of Justice, specifically barred the Court from entertaining any case that pertains to "domestic" matters *as determined by the United States*.²¹ Yet the American lawyers chose not to use this absolute defense.²² Instead, they tried in various other ways to challenge the Court's authority. They argued that the dispute was already before the Organization of American States and the UN Security Council; that it was

¹⁹ United Nations Convention on the Law of the Sea, Art. 76, *opened for signature* Dec. 10, 1982, UN Doc. A/CONF.62/122, *reprinted in* UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983), 21 ILM 1261 (1982).

²⁰ For a legislative history and analysis of the provisions of the 1958 Convention, see Whiteman, *Conference on the Law of the Sea: Convention on the Continental Shelf*, 52 AJIL 629 (1958).

²¹ 92 CONG. REC. 10,694 (1946).

²² As I have written elsewhere:

That the Connally Reservation did not license the United States to refuse to litigate *any* case for *any* reason whatsoever, that a "good faith" caveat was to be implied, is to be given some support by the fact that Connally was not invoked by U.S. lawyers to withdraw the Nicaraguan case from the I.C.J.'s jurisdiction.

Franck & Lehrman, *Messianism and Chauvinism in America's Commitment to Peace Through Law*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 3, 17 (L. Damrosch ed. 1987).

not a legal dispute at all, but a political one;²³ that Nicaragua, having failed to perfect its acceptance of the Court's compulsory jurisdiction, had no right to implead the United States. The failure of the lawyers to use the Connally shield is all the more remarkable because, whereas the reservation gave the United States a self-judging escape from the Court's jurisdiction, all the other defenses left the key jurisdictional decision up to the Court, which rejected every one.²⁴ Had the U.S. Government simply faced the Court with a "finding" that the mining of Nicaragua's harbors was a "domestic" matter for the United States, that would have ended the litigation. Instead, the United States went on to lose, not only on the matter of jurisdiction, but also, eventually, on the merits.²⁵

Why was the Connally shield rejected? The answer, surely, lies in its determinacy. Anyone reading its language would instantly understand that the reservation, while rather open-ended, nevertheless was not intended to cover such matters as the CIA's alleged mining of the harbors of a nation with which the United States was not at war. Although the term "domestic matter" is not so determinate as to bar all differences of interpretation—that, after all, is why its interpretation was reserved to the U.S. Government and not left to the Court—no reasonable interpretation of the concept could be stretched to cover the events in question. The U.S. legal strategists, anxious to do everything possible to stay out of court, nonetheless were unwilling to subject their client to the obloquy that would have ensued had the Connally shield been deployed. Interest gratification, convenience and advantage were sacrificed so as not to be seen as absurd.

Such foreboding of shame and ridicule is an excellent guide to determinacy. If a party seeking to justify its conduct interprets a rule in such a way as to evoke widespread derision, then the rule has determinacy. The violator's evidently tortured definition of the rule can be seen to exceed its range of plausible meanings.

Thus, while it may be true in theory, as Wittgenstein has charged, that no "course of action could be determined by a rule because every course of action can be made out to accord with the rule,"²⁶ some rules are less malleable; less open to manipulation, than others. Although Wittgenstein's point has merit—and has recently been wittily adumbrated by Professor Duncan Kennedy²⁷—in practice, determinacy is not an illusion. No verbal formulas are entirely determinate, but some are more so than others.

²³ The United States announced that the case involved "an inherently political problem that is not appropriate for judicial resolution." Department Statement, Jan. 18, 1985, DEP'T ST. BULL., No. 2096, March 1985, at 64, 64, reprinted in 24 ILM 246, 246 (1985), 79 AJIL 438, 439.

²⁴ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26).

²⁵ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

²⁶ L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 81, para. 201 (G. E. Anscombe trans. 1953).

²⁷ Kennedy, *Towards a Critical Phenomenology of Judging*, 36 J. LEGAL EDUC. 518 (1986).

The degree of determinacy of a rule directly affects the degree of its perceived legitimacy. A rule that prohibits the doing of "bad things" lacks legitimacy because it fails to communicate what is expected, except within a very small constituency in which "bad" has achieved a high degree of culturally induced specificity. To be legitimate, a rule must communicate what conduct is permitted and what conduct is out of bounds. These bookends should be close enough together to inhibit incipient violators from offering self-serving exculpatory definitions of the rule. When almost everyone scoffs at such an exculpation, the outer boundary of the rule's determinacy has been established.

There is another sense in which determinacy increases the legitimacy of a rule text. A rule of conduct that is highly transparent—its normative content exhibiting great clarity—actually *encourages* gratification deferral and rule compliance. States, in their relations with one another, frequently find themselves tempted to violate a rule of conduct in order to take advantage of a sudden opportunity. If they do not do so, but choose, instead, to obey the rule and forgo that gratification, it is likely to be because of their longer term interests in seeing a potentially useful rule reinforced. They can visualize future situations in which it will operate to their advantage. But they will only defer the attainable short-term gain if the rule is sufficiently specific to support reasonable expectations that benefit can be derived in a contingent future by strengthening the rule in the present instance.

Let us consider the case of a foreign ambassador's son who has murdered someone in Washington, D.C. He is about to be "bcoke'd" by the District police when a message arrives from the State Department demanding his release. The Secretary of State announces that the culprit is to be sent home. Hearing of this, the public understandably is outraged; members of Congress complain to the President. Patiently, the Secretary of State explains that "almost all" states "almost always" act in accordance with the universal rules of diplomatic immunity, which protect ambassadors and their immediate family from arrest and trial.²⁸ Although in this instance, the Secretary continues, the rule does seem to work an injustice, in general it operates to make diplomacy possible. By gratifying popular outrage and violating the rule this time, the United States would weaken the rule's future utility, its reliability in describing and predicting state behavior. Alternatively, by acting in compliance with the rule, even at some short-term cost to its self-interest, the United States will reinforce the rule text and thus its future utility in protecting U.S. diplomats and their families abroad.²⁹ Indeed, a study by a committee of the British House of Commons—conducted after a shot from

²⁸ Vienna Convention on Diplomatic Relations, *supra* note 16, Arts. 31, 37.

²⁹ The Department of State, on Aug. 5, 1987, submitted its views on a "bill to make certain members of foreign diplomatic missions and consular posts in the United States subject to the criminal jurisdiction of the United States with respect to crimes of violence." "The Department (Ambassador Selwa Roosevelt) 'could not support the proposed legislation because it would be detrimental to U.S. interests abroad.' If enacted, the law 'would place the United States in violation of its international obligations' and would invite more harmful reciprocal action. Contemporary Practice of the United States, 82 AJIL 106, 107 (1988). For the text of Ambassador Roosevelt's statement, see also DEP'T ST. BULL., No. 2127, October 1987, at 29.

the Libyan embassy ("People's Bureau") on April 17, 1984, killed an on-duty London policewoman—came to something very like this conclusion despite the inflamed state of public opinion.³⁰

Note, however, that this thoughtful argument by the Secretary against interest gratification only makes sense if the son's immunity is seen as part of a clearly understood normative package, that other countries will refrain from arresting members of the families of U.S. ambassadors on real or trumped-up charges. Such expectations of reciprocity are important threads in the fabric of the international system; but before an expectation of reciprocity can arise, there must be some mutual understanding of what the rule covers, what events constitute "similar circumstances." If the contents of the rule are vaguely defined and fuzzy—if some countries in some instances have extended immunity to the ambassador's children while others have not, or have done so only if no capital crime is involved, or only if the child was actually working for the embassy, or have not extended immunity to second sons, or daughters or stepchildren—the impetus for gratification deferral in the instant case would diminish. The demand for the trial of the ambassador's son might then be both reasonable and irresistible. It could quite easily be defended as not violating a "real" rule. The argument could also be made that bringing the son to trial would create no more hazards for American diplomats abroad than were already posed by the vagueness of the rule. If a norm is full of loopholes, there is little incentive to impose on oneself obligations that others can evade easily.

An excellent example of this cost of indeterminacy is offered by the rules prohibiting and defining aggression that were approved in 1974 by the General Assembly after some 7 years of debate. Among the actions branded as aggression is the "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State." Almost in the same breath, however, the text states that nothing in the foregoing "could in any way prejudice the right to self-determination, freedom and independence . . . of peoples forcibly deprived of that right . . . ; nor the right of these peoples . . . to seek and receive support." To confuse matters further, another article declares that no "consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression"; and yet another adds that in "their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions."³¹ Interrelated they may be, but like a tangled skein. Do they prohibit or encourage aid by one country to an insurgent movement in

³⁰ H.C. FOREIGN AFFAIRS COMMITTEE, FIRST REPORT, THE ABUSE OF DIPLOMATIC IMMUNITIES AND PRIVILEGES, REPORT WITH ANNEX; TOGETHER WITH THE PROCEEDINGS OF THE COMMITTEE; MINUTES OF EVIDENCE TAKEN ON 20 JUNE AND 2 AND 18 JULY IN THE LAST SESSION OF PARLIAMENT, AND APPENDICES (1984). See also Higgins, *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience*, 79 AJIL 641 (1985).

³¹ Definition of Aggression, GA Res. 3314, 29 UN GAOR Supp. (No. 31) at 142, UN Doc. A/9631 (1974).

another? It is not that the individual mandates and caveats are opaque, but that, seeking to reconcile irreconcilable positions, they contradict one another. Such a muddled obligation, one would expect, could have little effect on the real-world conduct of states; and one would be right.

It happens—by way of contrast—that, in international practice, the rules protecting diplomats, as codified by the Vienna Convention, have a very high degree of specificity,³² and they are almost invariably obeyed. So, too, are the highly specific rules, in another Vienna Convention, on the making, interpreting and obligation of treaties.³³ Among other subjects covered by determinate rules that exert a strong pull to compliance and, in practice, elicit a high degree of conforming behavior by states are jurisdiction over vessels on the high seas, and in territorial waters and ports,³⁴ jurisdiction over aircraft,³⁵ copyright and trademarks,³⁶ and international usage of posts,³⁷ telegraphs, telephones³⁸ and radio waves.³⁹ There is also a high degree of determinacy in the rules governing embassy property,⁴⁰ rights of passage of naval vessels in peacetime,⁴¹ treatment of war prisoners⁴² and the duty of governments to pay compensation—even if not as to the *measure* of that compensation—for the expropriation of property belonging to aliens.⁴³

³² See Vienna Convention on Diplomatic Relations, *supra* note 16, Arts. 27, 28.

³³ See Vienna Convention on the Law of Treaties, Arts. 6, 55, *opened for signature* May 23, 1969, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969), *reprinted in* 8 ILM 679 (1969), 63 AJIL 875 (1969).

³⁴ United Nations Convention on the Law of the Sea, *supra* note 19.

³⁵ Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 UST 2941, TIAS No. 6768, 704 UNTS 219.

³⁶ Universal Copyright Convention, July 24, 1971, 25 UST 1341, TIAS No. 7868 (revised version of 216 UNTS 132).

³⁷ See UNIVERSAL POSTAL UNION CONST., July 10, 1964, 16 UST 1291, TIAS No. 5881, 611 UNTS 7.

³⁸ See Telegraph and Telephone Regulations, with appendices, annex, and final protocol, Apr. 11, 1973, 28 UST 3293, TIAS No. 8586.

³⁹ See International Telecommunication Convention, Oct. 25, 1973, 28 UST 2495, TIAS No. 8572.

⁴⁰ See Vienna Convention on Diplomatic Relations, *supra* note 16, Art. 22 (which provides for inviolability of diplomatic missions and imposes a special duty on states to protect premises of missions on their territory). See also Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 UST 1975, TIAS No. 8532, 1035 UNTS 167 (which criminalizes violent attacks upon the official premises of internationally protected persons).

⁴¹ The right of innocent passage was specifically provided for in Article 14 of the Geneva Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 UST 1606, TIAS No. 5639, 516 UNTS 205, and by Article 17 of the UN Convention on the Law of the Sea of 1982, *supra* note 19.

⁴² See Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, TIAS No. 3364, 75 UNTS 135. For a complete treatment of war prisoners, see N. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* (1987).

⁴³ As to compensation for expropriated property, there is agreement in principle, but disagreement as to the measure of compensation. See, e.g., Charter of Economic Rights and Duties of States, Dec. 12, 1974, Art. 2(2)(c), GA Res. 3281, 29 UN GAOR Supp. (No. 31) at 50, UN

What is interesting about these examples is that the high degree of textual determinacy goes together with a high degree of rule-conforming state behavior. When determinacy is absent, it is unlikely that states will have compunctions about not complying with the rule. Indeed, some rules are probably written with low determinacy so that noncompliance will be easy.

A good example is the abortive effort by the United Nations to draft a code for the prevention and punishment of terrorism. In 1972, at the initiative of Secretary-General Kurt Waldheim, the General Assembly tried its hand at devising a set of rules requiring states to act in concert against what was perceived as a global problem.⁴⁴ Two years of negotiations demonstrated the difficulty of coming to a commonly acceptable definition of the activity to be prohibited.⁴⁵ The Government of Senegal, for example, proposed on behalf of the Non-Aligned Group that the prohibition should include "acts of violence and other repressive acts by colonial, racist and alien régimes against peoples struggling for liberation, for their legitimate right to self-determination, independence and other human rights and fundamental freedoms." The same group urged an exception in favor of those committing terrorist acts on behalf of "the inalienable right to self-determination and independence of all peoples under colonial and racist régimes and other forms of alien domination," in recognition of "the legitimacy of their struggle, in particular the struggle of national liberation movements."⁴⁶ The Soviet Union demanded exemption from the prohibition on terrorism for "acts committed in resisting an aggressor in territories occupied by the latter, and action by workers to secure their rights against the yoke of exploiters."⁴⁷

Understandably, the United States and other Western countries took the position that these exculpatory caveats, if adopted, would shape a definition

Doc. A/9631 (1974). *See also* Resolution on Permanent Sovereignty over Natural Resources, GA Res. 1803, 17 UN GAOR Supp. (No. 17) at 15, UN Doc. A/5217 (1962). Article 4 of the latter states in part concerning expropriation: "In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law." *But see* Resolution on Permanent Sovereignty over Natural Resources, GA Res. 3171, 28 UN GAOR Supp. (No. 30) at 52, UN Doc. A/9030 (1973). Article 3 "affirms" that "each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures."

⁴⁴ UN Docs. A/8791 and A/8791/Add.1 (1972).

⁴⁵ *See, e.g.,* *Ad Hoc* Committee on International Terrorism, Observations of States Submitted in Accordance with General Assembly Resolution 3034 (XXVII), UN Docs. A/AC.160/1 and Add. 1-2 (1973).

⁴⁶ UN Doc. A/AC.160/3/Add.2, at 3 (1973).

⁴⁷ UN Doc. A/AC.160/2, at 7 (1973). However, Ambassador Oakley has reported a new Soviet "awareness that distinctions must be made between so-called liberation movements and groups whose objectives and operations are primarily directed toward producing terror, and whose targets are often unrelated to their putative 'liberation' goals." Oakley, *International Terrorism*, 65 FOREIGN AFF. 628 (1987).

of terrorism that would exacerbate, rather than ameliorate, the problem. The loopholes would be so large as to permit unimpeded passage for almost any act of violence claimed to be directed against a wicked regime. On the other hand, few governments would be willing to implement a prohibition on all politically motivated violence against every regime, no matter how repressive. Even the United States has put forward the "Reagan Doctrine,"⁴⁸ with its sophisticated distinctions that exculpate external support for "good" insurgents against "bad" regimes, while excoriating support for "bad" insurgents against "good" regimes.⁴⁹

The Reagan Doctrine was merely the most recent restatement of the "just war" notion, evolved by Christian thinkers in the time of Emperor Constantine to reconcile their pacifist theology with imperial military needs,⁵⁰ and reinterpreted by Augustine,⁵¹ Aquinas⁵² and Grotius.⁵³ Each version has sought to define the circumstances in which war is permissible, against the background of a more general prohibition. These efforts appeal to common sense and human decency. As long as there is no Austinian world sovereign and centralized world police force, there will be good (defensive) wars and bad (aggressive) wars. Articles 2(4) and 51 of the United Nations Charter⁵⁴ likewise seem to bless this distinction. The problem is to distinguish good violence from bad without the benefit of a papal decision.

This problem—how to tell the sheep from the goats—operates whenever a rule tolerates exculpatory distinctions. While simple rules inherently suffer from lack of humanity, reason and texture, more complex ones tend to be hard to apply or to make exculpation too easy. Thus we have a literary conundrum. In consequence of making a simple, but irrational, rule more complex, sensible and humane, the text may become too elastic to secure compliance. For example, applying the proposed international norms known as the Reagan Doctrine, Ambassador Jeane Kirkpatrick has argued that U.S. support for the Nicaraguan contras is permissible, but Soviet and Cuban support for the Sandinistas is not, because the contras are democrats fighting a totalitarian regime while the Sandinistas are totalitarians used by

⁴⁸ See Address by Ambassador Kirkpatrick, National Press Club (May 30, 1985), which in effect gave new life to the "just war" doctrine.

⁴⁹ On this policy, see Franck, *Porfiry's Proposition: Legitimacy and Terrorism*, 20 VAND. J. TRANSNAT'L L. 195, 218 (1987). See *infra* text accompanying note 55.

⁵⁰ F. RUSSELL, *THE JUST WAR IN THE MIDDLE AGES* 12 (1975).

⁵¹ *Id.* at 18–20.

⁵² T. AQUINAS, *SUMMA THEOLOGIAE*, Question 40, Art. 1 (T. Heath trans. 1972).

⁵³ See H. GROTIUS, *ON THE LAW OF WAR AND PEACE* (L. Loomis trans. 1949); Edwards, *The Law of War in the Thought of Hugo Grotius*, 19 J. PUB. L. 371 (1970). Grotius expressly contemplated intervention by a third state to protect the natural law rights of the citizens of another state. See bk. II, ch. XXV of H. GROTIUS, *supra* (entitled "On the Causes of Undertaking War on Behalf of Others").

⁵⁴ UN CHARTER. Article 2(4) seeks to curb aggressive wars by imposing the obligation on states to refrain from the threat or use of force against the territorial integrity or political independence of any state, while Article 51 provides support for the inherent right of individual or collective self-defense in case of armed attack.

Russians and Cubans to colonize Nicaragua.⁵⁵ A rule that lends itself to that interpretation, however humane and rational its intent, is unlikely to inhibit any state from pursuing every opportunity for short-term interest gratification. It will be dismissed from serious consideration by states as they weigh their options.

Determinacy thus poses a dilemma. As defined, the term "determinacy" has been used to indicate the clarity of the message transmitted by a rule to those at whom it is directed as a command. We have argued that greater clarity conduces to compliance. Now, however, it has become apparent that "clarity" is far from identical with simplicity. For example, the UN Charter, in Articles 2(4) and 51, sets out a simple rule pertaining to the use of force. It says, in substance, that a state may not use force against another except to respond to an *actual armed attack*. This rule, on its face, seems to enjoy a high level of determinacy. And in most instances of conflict, the rule also makes sense. It is usually possible, in these days of outer space sensing devices, to provide persuasive proof of which state initiated hostilities. Even without such evidence, the answer can usually be determined by looking to see which party is winning after the first day of fighting. Nevertheless, despite its superficial clarity, the rule—under certain circumstances—does not satisfy the test of genuine determinacy: it does not send a clear message as to its meaning in such a way as to promote compliance. This is because a literal reading of the law will produce absurd obligations at the margins of its application. Thus, the rule would seem to compel a state threatened by a nuclear attack to wait until it had actually been hit ("armed attack") before being permitted to use force in self-defense.⁵⁶ The rule would also require a tiny state like Israel or Singapore to wait until after an armed attack before striking back, even though it might well have been overrun in that first offensive. In Mr. Bumble's words, "If the law supposes that, the law is a ass—a idiot." Such a rule lacks essential legitimacy, because it is easy to

⁵⁵ Address by Ambassador Kirkpatrick, *supra* note 48. The Reagan doctrine is not the only 20th-century attempt to revive the just war doctrine. The Soviet Union has long maintained that "[j]ust wars . . . are not wars of conquest but wars of liberation, waged to defend the people from foreign attack and from attempts to enslave them, or to liberate the people from capitalist slavery, or, lastly, to liberate colonies and dependent countries from the yoke of imperialism." COMMISSION OF THE CENTRAL COMMITTEE OF THE C.P.S.U., HISTORY OF THE COMMUNIST PARTY OF THE SOVIET UNION (BOLSHEVIKS) 167-68 (1939). The modern non-aligned movement has also upheld the just war doctrine, one result being the provisions of Protocol I to the Geneva Conventions. See, e.g., Art. 1(4), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, INTERNATIONAL COMMITTEE OF THE RED CROSS, PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 3 (1977), reprinted in 16 ILM 1391 (1977). This position was dramatically put forth in a 1973 General Assembly resolution: "colonial peoples have the inherent right to struggle by all necessary means at their disposal against colonial Powers and alien domination in exercise of their right of self-determination." GA Res. 3103, 28 UN GAOR Supp. (No. 30) at 142, UN Doc. A/9030 (1973). See also GA Res. 2105, 20 UN GAOR Supp. (No. 14) at 3, UN Doc. A/6104 (1965). For a case study, see Dugard, *SWAPO: The Jus ad Bellum and the Jus in Bello*, 93 S. AFR. L.J. 144 (1976).

⁵⁶ See Franck, *Who Killed Article 2(4)?*, 64 AJIL 809, 820-22 (1970).

predict that in at least some situations no state would abide by its strictures. If a patently absurd result—a *reductio ad absurdum*—accrues from the only possible application of the evident meaning of a simple rule in circumstances requiring a more calibrated response, then it becomes evident that the rule will not be taken seriously in those circumstances, and perhaps also not in others.

If simplicity of text is an invitation to *reductio ad absurdum*, which undermines the determinacy of a rule, and if complexity imposes an elasticity that deprives it of determinate meaning, what can be said about determinacy that is not self-contradicting? There is an answer to this riddle, but it requires attention to detail and, in particular, to content. A simple, straightforward rule—"red light to port, green light to starboard"—will have a high level of determinacy if the problem to which it is addressed is widely recognized as essentially binary: that is, capable of being resolved by an objective test of compliance involving a choice between only two options. A true-false test is binary in this sense. Most traffic regulations also are of this kind. So are prohibitions on specific acts as to which there is general agreement that no exculpatory exceptions are ever admissible. One example is aerial hijacking.⁵⁷ The United States, however ruefully, has prosecuted a gunman who seized an aircraft to escape from Eastern bloc oppression,⁵⁸ because it felt obliged to discharge its obligation under the Hague Convention either to prosecute or to extradite hijackers.⁵⁹ The binary view of hijacking—it either *is* or *is not*, but no excuse will avail—is also manifest in the accord signed by the United States and Cuba in 1973,⁶⁰ and in the 1978

⁵⁷ [Tokyo] Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 UST 2941, TIAS No. 6768, 704 UNTS 219; [Hague] Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 UST 1641, TIAS No. 7192 [hereinafter Hague Convention]; [Montreal] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 UST 564, TIAS No. 7570.

⁵⁸ This scenario most notably occurred when an East German hijacked a Polish airliner to West Berlin. As an outgrowth of the historical and jurisdictional freak that is Berlin, the hijacker was charged with crimes under West German law but prosecuted by the United States and tried in an American court. The U.S. ambassador to West Germany appointed a New Jersey federal district judge, Herbert Stern, to preside over the trial. See H. STERN, JUDGMENT IN BERLIN (1984). Judge Stern, applying U.S. constitutional law, determined that the defendant was entitled to a jury trial (despite the anomaly that juries generally do not exist under German law). *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979). Impaneling a jury of West Berliners to judge an East German "refugee" raised the specter that the jury would refuse to convict the defendant in the American tradition of jury nullification. See Lowenfeld, *Hijacking, Freedom, and the "American Way"*, 83 MICH. L. REV. 1000, 1005 (1985). In other words, the jury would in effect graft a complex clause upon the linear law of the Hague Convention. In the end, the jury did acquit the defendant of hijacking but convicted him of hostage taking. H. STERN, *supra*, at 350. Judge Stern, affronted throughout the trial by the American prosecutor's stance that the Constitution was inapplicable to West Berlin and skeptical that parole (which he thought appropriate) would be granted, sentenced the hostage taker to time served (9 months) and released him from custody. *Id.* at 369-70.

⁵⁹ Hague Convention, *supra* note 57, Arts. 7, 8.

⁶⁰ Memorandum of Understanding on Hijacking of Aircraft and Vessels and Other Offenses, Feb. 15, 1973, United States-Cuba, 24 UST 737, TIAS No. 7579.

Bonn Declaration adhered to by Canada, France, Italy, Japan, the United Kingdom, the United States and the Federal Republic of Germany,⁶¹ which imposes collective measures against states that refuse to extradite or prosecute hijackers.⁶² Similarly, there appears to be near-universal belief that an objective binary test should apply to hostage taking⁶³ and violence against diplomats.⁶⁴ Even Islamic and Soviet authorities joined in the UN Security Council⁶⁵ to condemn the Iranian violations of U.S. diplomatic immunity in Tehran in 1979, a decision that was reaffirmed by a nearly unanimous International Court of Justice.⁶⁶ It is not difficult to visualize other narrow

⁶¹ *International Terrorism*, DEP'T ST. BULL., No. 2018, September 1978, at 5 [hereinafter Bonn Declaration].

⁶² *Id.* This language tracks Articles 7 and 9(2) of the Hague Convention, *supra* note 57. The Bonn Declaration in effect grafts an enforcement mechanism upon the norms embodied in the Hague Convention. However, imposition of sanctions under the Bonn Declaration is not premised on violation of the Hague Convention. Accordingly, sanctions might be taken against a state that had refused to sign the Hague Convention, not on the basis of the duty to prosecute or extradite (assuming, as is likely, that that is not a duty under customary international law), but on the basis that the support of international terrorism violates international law. See Levitt, *International Counterterrorism Cooperation: The Summit Seven and Air Terrorism*, 20 VAND. J. TRANSNAT'L L. 37 (1987). See also Chamberlain, *Collective Suspension of Air Services with States Which Harbour Hijackers*, 32 INT'L & COMP. L.Q. 616, 628-32 (1983); Busuttil, *The Bonn Declaration on International Terrorism: A Non-Binding International Agreement on Aircraft Hijacking*, 31 INT'L & COMP. L.Q. 474 (1982). Specifically, the Seven would (1) "take immediate action to cease all flights to that country," and (2) "initiate action to halt all incoming flights from that country or" (3) "from any country by the airlines of the country concerned." Bonn Declaration, *supra* note 61.

⁶³ International Convention Against the Taking of Hostages, Dec. 17, 1979, GA Res. 34/146, 34 UN GAOR Supp. (No. 46) at 245, UN Doc. A/34/46 (1979). The negotiations for the Hostages Convention reveal the opposition that a straightforward rule, even one for a compartmentalized activity, faces. Attempts at a reformulation of the Convention ranged in sophistication. Several delegations suggested the Convention should only protect "innocent" hostages. See, e.g., UN Doc. A/32/39, at 38 (1977) (statement of Egypt); *id.* at 40 (statement of Guinea, using Ian Smith as an illustrative guilty hostage). The Tanzanian delegate proposed an exculpatory clause and provided an umpire: "For the purposes of the Convention, the term 'taking of hostages' shall not include any act or acts carried out in the process of national liberation against colonial rule, racist and foreign regimes, by liberation movements recognized by the United Nations or regional organizations." UN Doc. A/AC.188/L.5 (1977). The Pakistani delegate wished to condition invocation of the Hostages Convention against national liberation movements on the target state's acceptance of both the Geneva Conventions and the 1977 Protocols. UN Doc. A/C.6/34/SR.62, at 2 (1979).

⁶⁴ Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, *supra* note 40. See also Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that Are of International Significance, Feb. 2, 1971, 27 UST 3949, TIAS No. 8413. The latter, an OAS version of the Internationally Protected Persons Convention, specifically condemns all physical attacks on diplomats, "regardless of motive" (Art. 2). This protection afforded diplomats can be analogized to the 11th-century Peace of God doctrine, which declared certain classes, especially the clergy, exempt from all violence. F. RUSSELL, *supra* note 50, at 34.

⁶⁵ SC Res. 461, 34 UN SCOR (Res. & Dec.) at 24, UN Doc. S/INF/35 (1979).

⁶⁶ United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3 (Judgment of May 24).

categories of international offenses that could be defined without exculpatory caveats: offenses against children,⁶⁷ the use of biological⁶⁸ and chemical weapons,⁶⁹ and offenses against nonbelligerent civilians.⁷⁰

Issues that cannot be reduced to simple binary categories invite regulation by more complex rule texts which, while avoiding the problem of *reductio ad absurdum*, suffer the costs of elasticity. A rule finely calibrated to reflect complex considerations, embodying a textured system of regulatory and exculpatory principles, may suffer legitimacy costs because it invites disputes as to its applicability in any particular case. These costs, however, can be reduced by introducing a forum in which ambiguity can be resolved case by case. Such a legitimate forum mitigates the textual elasticity of the rule by introducing process determinacy. One example is a provision in the 1982 Law of the Sea Convention that deals with the allocation of continental shelf shared by two or more riparian states. The shelf should be apportioned, the rule says, "on the basis of international law . . . in order to achieve an equitable solution."⁷¹ The evidently nonbinary quality of this rule, the vagueness of the notion of an "equitable solution," has been redressed effectively in a series of interpretations by the International Court of Justice. The judges have noted that the treaty sets "a standard, and it is left to the States themselves, or to the courts, to endow this standard with specific content."⁷² This the Court has set out to do. In a 1969 opinion, the judges had ruled that there should be some relation "between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline."⁷³ In a 1982 case between Tunisia and Libya⁷⁴ and a 1985 dispute between Libya and Malta,⁷⁵ they gave quite specific content to an "equitable solution." In this

⁶⁷ The rights of children were recently codified in the Draft Convention on the Rights of the Child, UN Doc. E/CN.4/1986/39. In addition, these rights are treated in the Declaration of the Rights of the Child, GA Res. 1386, 14 UN GAOR Supp. (No. 16) at 19, UN Doc. A/4354 (1959); the Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810, at 71 (1948), Arts. 25, 26; the International Covenant on Civil and Political Rights, GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), Arts. 6, 14, 23, 24; and the International Covenant on Economic, Social and Cultural Rights, GA Res. 2200, *id.* at 49, Arts. 10, 12. See Bennett, *A Critique of the Emerging Convention on the Rights of the Child*, 20 CORNELL INT'L L.J. 1 (1987).

⁶⁸ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 12, 1972, 26 UST 583, TIAS No. 8062.

⁶⁹ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 UST 571, TIAS No. 8061, 94 LNTS 65.

⁷⁰ Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287.

⁷¹ United Nations Convention on the Law of the Sea, *supra* note 19, Art. 83(1).

⁷² Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 ICJ REP. 13, 30-31 (Judgment of June 3).

⁷³ North Sea Continental Shelf (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, 54 (Judgment of Feb. 20).

⁷⁴ See Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 ICJ REP. 18, 35 (Judgment of Feb. 24).

⁷⁵ 1985 ICJ REP. at 44.

way, the elastic rule text has gained determinacy, just as the papacy once gave content to the vague notion of "just" wars.

Process determinacy is not solely the prerogative of courts. Any institution that is seen to be acting legitimately may be used for the purpose. "Acting legitimately" means here that those it addresses perceive the forum itself as having come into being in accordance with right process. In practice, the legitimacy of a forum can be tested in the same way as that of a rule: by reference to the determinacy of its charter, its pedigree, the coherence of its mandate and its adherence to the normative institutional hierarchy of international organization. Nowadays, the UN General Assembly and Security Council, as well as organs of regional organizations, sometimes play this clarifying role. They will only succeed, however, if they are seen to be acting in accordance with their specific mandate and the general principles of fairness; that is, in a disinterested, principled fashion and not simply to gratify some short-term self-interest of a faction. Moreover, each rule-decision emanating from a legitimate forum is itself subject to the test of its perceived legitimacy: its determinacy, coherence, and so forth.

To summarize: the legitimacy of a rule is affected by its degree of determinacy. Its determinacy depends upon the clarity with which it is able to communicate its intent and to shape that intent into a specific situational command. This, in turn, can depend upon the literary structure of the rule, its ability to avoid *reductio ad absurdum* and the availability of a process for resolving ambiguities in its application.

III. SYMBOLIC VALIDATION AND LEGITIMACY

As determinacy is the linguistic or literary-structural component of legitimacy, so *symbolic validation*, *ritual* and *pedigree* provide its cultural and anthropological dimension. As with determinacy, so here, the legitimacy of the rule—its ability to exert pull to compliance and to command voluntary obedience—is to be examined in the light of its ability to communicate. In this instance, however, what is to be communicated is not so much content as *authority*:⁷⁶ the authority of a rule, the authority of the originator of a validating communication and, at times, the authority bestowed on the recipient of the communication. The communication of authority, moreover, is symbolic rather than literal. We shall refer to these symbolically validating communications as cues.

These three concepts—symbolic validation, ritual and pedigree—are related, but not identical. The *symbolic validation* of a rule, or of a rule-making process or institution, occurs when a signal is used as a cue to elicit compliance with a command. The cue serves as a surrogate for enunciated reasons for such obedience. The singing of the national anthem, for example, is a vocal and (on public occasions) a visual signal symbolically reinforcing the citizen's relationship to the state, a relationship of rights and duties. This

⁷⁶ Schachter, *supra* note 1, at 309–11. Schachter uses the terms "competence and authority" to cover some of the same matters. In his formulation, "whether a designated requirement is to be regarded as obligatory will depend in part on whether those who have made that designation are regarded by those to whom the requirement is addressed (the target audience) as endowed with the requisite competence or authority for that role." *Id.* at 309.

compliance reinforcement need not be spelled out in the actual words of the anthem (as it is not in the commonly used stanza of the American one). The act of corporate singing itself is a sufficient cue to validate the fabric of regularized relationships that are implicated in good citizenship. We are not really singing about bombs bursting in the night air, but about free and secret elections, the marketplace of ideas, the rule of valid laws and impartial judges.

Ritual is a specialized form of symbolic validation marked by ceremonies, often—but not necessarily—mystical, that provide unenunciated reasons or cues for eliciting compliance with the commands of persons or institutions. The entry of the mace into the British House of Commons is intended to call to mind the Commons's long and successful struggle to capture control of lawmaking power from the Crown. It functions as a much more direct, literal kind of symbolic validation than the "Star-Spangled Banner." Ritual is often presented as drama, to communicate to a community its unity, its values, its uniqueness in both the exclusive and the inclusive sense.

All ritual is a form of symbolic validation, but the converse is not necessarily true. *Pedigree* is a different subset of cues that seek to enhance the compliance pull of rules or rule-making institutions by emphasizing their historical origins, their cultural or anthropological deep-rootedness. An example is the practice of "recognition." When a government recognizes a new regime, or when the United Nations admits a new state to membership, this partly symbolic act has broad significance. It endows the new entity with a range of entitlements and duties, the concomitants of sovereignty. The capacity of states, and, nowadays, perhaps also of the United Nations, to confer sovereignty and its incidents in this fashion derives not from some treaty or other specific agreement but from the ancient practice of states and groupings of states, which legitimizes the exercise of this power.⁷⁷ The time-honored recognition practices by which status is conferred symbolically include such subsets as recognition "de facto" and "de jure," recognition of states and governments, the opening of diplomatic relations, and, in the United Nations, admittance to membership and acceptance of delegates' credentials. Along similar lines, Professor Schachter has observed that a body of rules produced by the UN legislative drafting body, the International Law Commission, will be more readily accepted by the nations "after [the Commission] has devoted a long period in careful study and consideration of precedent and practice." Moreover, the authority will be greater if the product is labeled *codification*—that is, the interpolation of rules from deep-rooted evidence of state practice—"than if it were presented as a 'development' (that is, as new law),"⁷⁸ even though the Commission (as a subsidiary of the General Assembly) is equally empowered by the UN Charter to promote "the progressive development of international law and its codification."⁷⁹ The compliance pull of a rule is enhanced by a demonstrable lineage. A new rule will have greater difficulty finding compliance, and even evidence of its good sense may not fully compensate for its lack of

⁷⁷ For a discussion of the origins of recognition policy and procedure, see I. L. OPPENHEIM, *INTERNATIONAL LAW* 124-52 (H. Lauterpacht 8th ed. 1955).

⁷⁸ Schachter, *supra* note 1, at 310.

⁷⁹ UN CHARTER art. 13(1)(a).

breeding. Nevertheless, a new rule may be taken more seriously if it arrives on the scene under the aegis of a particularly venerable sponsor such as a widely ratified multilateral convention, or a virtually unanimous decision of the International Court of Justice.

Symbolic validation, ritual and pedigree are part of the legitimation strategy of all communities, all compliance-inducing rule systems. A study of the legitimacy of imperial authority in ancient China observes that rituals and symbols, "by endowing authority with mystical values and legitimacy, serve not merely to reflect authority but also to recreate and reinforce it. By such means the extent to which people are persuaded to accept a given authority goes far beyond the obedience normally elicited by force."⁸⁰ Similar observations have derived from the study of Aztec legitimation strategy, which was found to employ a social tactic making extensive symbolic resources available to achieve "political socialization."⁸¹ For example, the government made a point of distributing food to the citizenry at certain state ceremonies. Feeding as Christian sacrament is also a symbolic validation of status as members of the mystical body of Christ, of hierarchic authority structure within that community, and serves as a renewal of commitment and obligation.

"Political legitimacy," a study of ancient China notes, "can be said to adhere to a regime and its authorities when the governed are convinced that it is right and proper to obey them and to abide by their decisions."⁸² This conviction was cued symbolically in Aztec society by priests who provided "supernatural sanction for legitimate state authority,"⁸³ rather as did the Roman Pontifex Maximus.⁸⁴ But, in many societies, ritual and pedigree will have their symbolic roots in the cultural and political, rather than the religious, experience. In a posttheistic society, ritual is not discarded; rather, politics and history are substituted for magic and myth as the compliance-inducing or status-securing cue.

For example, in Britain the rule that a parliamentary bill becomes law only after receiving the assent of the Crown⁸⁵ certainly no longer relates to the divine right of monarchs. Although the Queen's title still claims that she rules "by the grace of God," it is not widely believed either that the Queen rules or, for that matter, that there is a God, particularly one involved in

⁸⁰ H. WECHSLER, *OFFERINGS OF JADE AND SILK* 21 (1985).

⁸¹ Kurtz, *Strategies of Legitimation and the Aztec State*, 23 *ETHNOLOGY* 301, 309 (1984).

⁸² H. WECHSLER, *supra* note 80, at 10.

⁸³ Kurtz, *supra* note 81, at 306.

⁸⁴ The Pontifex's task, originally, was to legitimate political authority by appeasing the river god Tiber over whose banks the civil authorities had built a useful, but undeniably intrusive, bridge.

⁸⁵ When presenting bills for royal assent, the Speaker of the House of Commons pays homage to the Crown with the formula: "Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows . . ." O. PHILLIPS, *A FIRST BOOK OF ENGLISH LAW* 118-19 (7th ed. 1977). The Crown's right to refuse assent to bills that have properly passed through both Houses of Parliament is "practically obsolete." A. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 114 (9th ed. 1939). In fact, when the Unionists posited in 1913 that the reference to assent restored a real right of veto, the theory was criticized as "obviously absurd" and was said to have troubled the king. E. RIDGES, *CONSTITUTIONAL LAW* 106 (8th ed. 1950).

British government. A utilitarian explanation for the survival of the historic ritual of royal assent would have to look elsewhere.

Oddly, the very obsolescence of the practice of royal assent helps keep it alive. The act of seeking the Queen's signature on legislation, even when it is clear that she has no choice but to grant it, is not meaningless. It signifies the Government's acceptance of all the accumulated encrustation of customs that define and restrict British governmental powers and practices. The Speaker of the House, for example, assures the Queen that the bill has had its customary three readings in Parliament and has passed both Houses.⁸⁶ While meaning little in itself, since the governing party usually can command the parliamentary majority necessary to do what it wants, the ritual of three readings⁸⁷ symbolizes the governing party's subordination to orderly, unhurried parliamentary procedure. In an era of relentless bureaucratic momentum, these quaint historical-political rituals provide a delay for reflection and debate between the drafting of a bill and its implementation. The result is that the rituals of three readings and monarchical assent symbolically validate, cuing public compliance and serving to certify the legitimacy of the new law.

Of course, a bad law does not become a good one for having been anointed by parliamentary ritual and having received the blessing of pedigreed authority. A citizen who believes a law to be evil probably will not be induced to think otherwise by symbolic cues. Nevertheless, when decisions to comply or defy are made by those to whom a command is addressed, such cues, with their symbolic validation of its legitimacy, may tip the scales on the side of obedience.

The three-readings ritual is the secular analogue of the church's practice of "publishing the banns" of a proposed marriage on three successive Sundays before the actual nuptials are consecrated.⁸⁸ Even in this rational era, the publication of banns also has its residual validating force, which derives not from belief in the divine, but from faith in the evolutionary history that the ritual symbolizes. Just as the House of Commons's three readings celebrate the continuity of parliamentary democracy, the publication of banns symbolizes commitment to the social status of matrimony conferred by both the church and the acquiescent congregation. Both rituals constitute a recommitment to the society's procedural rules of recognition, the "rules of

⁸⁶ When a bill is presented to the Crown for assent, it bears an endorsement signed by the Speaker of the House certifying that the provisions of the Parliament Act have been complied with. Parliament Act, 1911, 1 & 2 Geo. 5, ch. 13, §2(2), *reprinted in SELECT STATUTES, CASES AND DOCUMENTS* 350, 352 (C. Robertson ed. 1935).

⁸⁷ For a full discussion of this ritual as it applies to the enactment of both public and private bills by the House of Commons and the House of Lords, see S. A. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 265-71 (3d ed. 1977).

⁸⁸ The calling of banns is the public and official announcement of persons who intend to marry and is meant to discover whether the parties are free to marry and whether any impediment to their lawful and valid marriage may exist. The tradition that no marriage was to be celebrated until after a triple publication of the church's banns originated in the 8th century and was extended over all Christendom by Pope Innocent III in 1215. *ENCYCLOPEDIA OF RELIGION* 357 (1979).

the game," about which more will be said below. These *secondary* rules about rules are particularly important because they are the yardstick by which all *primary* or substantive rules and commands can be tested. The legitimacy of secondary rules is particularly dependent on the length of their pedigree. They must be difficult to change if they are to be perceived as valid and able to validate. Thus, the secondary rules, as well as the primary rules made in accordance with them, derive their legitimacy in part from the rootedness of the former deep in the history and culture of the community. For this reason, a bill that did not undergo three readings and was not presented for the assent of the Crown would undoubtedly be perceived by Britons as lacking legitimacy, not because those rituals are believed to be powerful in themselves, but because the Government's failure to perform them would be seen as a repudiation of the ancient democratic essence of the British parliamentary system, of which the rites and pedigree are still potent cues.

As we have noted, validating cues are not a modern, or a western, invention. Pedigree is a particularly universal form of symbolic validation. Most societies make some form of linguistic connection between the concepts "old" and "venerable." In the ancient Aztec state, the rulers' hereditary relation to the Toltec dynasty "was the sacred source of legitimate power and authority,"⁸⁹ supplemented by a host of "pedigree nobles."⁹⁰ So, too, in the China of 1000 B.C., where the Mandate of Heaven doctrine endowed an ancient imperial series of rulers with historically pedigreed and ritually validated power that rested on an orderly system, or line, of succession.⁹¹

Ritual, too, is a pandemic validator of authority. The fundamental purpose of ritual in ancient China was to create a form of procedural legitimacy that Max Weber would have understood.⁹² The point is illustrated by the story of Kao-tsu (206–195 B.C.). When Kao-tsu founded the Han dynasty, he and his followers were "rough and ready fellows" and, to put them at ease, the emperor abolished the "elaborate and bothersome" *Ch'in* ritual code. Unfortunately, this made a "shambles of court audiences" as the members of his court went about "getting drunk, hurling insults at one another, and hacking up the wooden pillars of the palace with their swords. To introduce some decorum . . . , Kao-tsu was moved to appoint an erudite named Shu-sun T'ung to provide him with a court ritual consonant with his modest personal capacity for performing ceremonial." The experiment proved a great success. The ritual "served as a powerful tool for dignifying and strengthening the ruler's position and for controlling the behavior of subordinates. It emphasized the large gap between the position of emperor and that of mere bureaucrat, prevented former associates from presuming upon past friendships, and helped keep subordinates agreeably subservient."⁹³

In the modern state system, ritual and other kinds of symbolic validation play much the same role as in ancient and medieval national societies, inte-

⁸⁹ Kurtz, *supra* note 81, at 306.

⁹⁰ *Id.* at 308.

⁹¹ H. WECHSLER, *supra* note 80, at 12–15.

⁹² See *supra* note 10 (for Weber's perception that legitimacy in part stems from the authority issuing an order, rather than from the order itself).

⁹³ H. WECHSLER, *supra* note 80, at 25.

grating by inclusion and exclusion, seducing subjects into obeying rules and rulers, validating the exercise of power and generally contributing to the legitimization of the institutions and rules of the society. As a less-developed system, international society is underendowed with such symbolic validation, but what there is serves approximately the same legitimizing function as in ancient China, in the Aztec nation⁹⁴ and in modern parliamentary democracies.⁹⁵

Despite their paucity, there are significant examples of attempts by the international system to legitimize itself through ritual and pedigree. One of the oldest and most universal was by using marriage between children of heads of state as symbolic emphasis for a practical political and social compact between nations, sometimes merely reifying the concept of a "family" of allied nations, at other times leading to—legitimizing—actual political union or federation. The practice was common not only among medieval European royal houses, but also in Asia, Africa and the precolonial Americas. For example, in Aztec Mexico, the "head of state established alliances with neighboring states through marriage. . . . Acamapichtli is reputed to have married twenty daughters of the chiefs of the clans that comprised Aztec society."⁹⁶

One of the newest examples of symbolic international system legitimation is the creation of supranational agencies such as the United Nations Development Programme,⁹⁷ the International Bank for Reconstruction and Development⁹⁸ (the "World Bank"), the World Health Organization,⁹⁹ the Food and Agriculture Organization¹⁰⁰ and the United Nations International Children's Emergency Fund.¹⁰¹ Their role is to distribute benefits to the deserving and the needy, either in tandem, or in competition, with the unilateral donations still given by one country to another.

The purpose of these agencies is largely and usefully instrumental. Nevertheless, the form of the organization is heavily symbolic. The World Bank, for example, could as well have been set up with only the 12 to 16 chief industrial nations as members, since they contribute almost all its working capital. Instead, the symbolic mingling of donors and recipients in the bank's governing organs and bureaucracy is intended to purge the assistance given of the aura of direct dependence between recipient and donor, a relationship in which gratitude has often been superseded by bitterness. By symbolic multilateralization, gratitude is directed to the agency, all of whose

⁹⁴ See *supra* text accompanying note 81.

⁹⁵ See *supra* text accompanying notes 86–87.

⁹⁶ Kurtz, *supra* note 81, at 308.

⁹⁷ See GA Res. 2029, 20 UN GAOR Supp. (No. 14) at 20, UN Doc. A/6014 (1965).

⁹⁸ Articles of Agreement of the International Bank for Reconstruction and Development, *opened for signature* Dec. 27, 1945, 60 Stat. 1440, TIAS No. 1502, 2 UNTS 134.

⁹⁹ WORLD HEALTH ORGANIZATION CONST., July 22, 1946, 62 Stat. 2679, TIAS No. 1808, 14 UNTS 186.

¹⁰⁰ UN FOOD AND AGRICULTURE ORGANIZATION CONST., Oct. 16, 1945, 12 UST 980, TIAS No. 4803.

¹⁰¹ The United Nations International Children's Emergency Fund was founded by GA Res. 57, 1 UN GAOR (Res. pt.2) at 90, UN Doc. A/64/Add.1 (1946).

members participate, in most cases, as theoretical equals. This equality of participation is itself the symbolic representation of a confluence between sovereignty and interdependence that holds together the "community" of states.

The distribution of benefits by a global agency, with its own officials and symbols, also helps to create a sense of social solidarity—a primitive version of loyalty—between recipients (both persons and governments) and the international system (the "United Nations Family") of which the donor agency is a part, rather in the same way as did the Aztec rulers' ritual distribution of foodstuffs to subjects. This symbolic, as well as utilitarian, function of multilateral, institutionalized benevolence is familiar to anthropologists and sociologists who study the formation of national societies. In Aztec society, the "[c]onstruction and maintenance of temples and other public buildings appeased the gods, organized people's labor according to state directives and supported priests and other state functionaries."¹⁰² The Pharaohs similarly sought to serve both personal and socializing objectives in the construction of the pyramids.¹⁰³ This concept of legitimization through the symbolism of public works has not been unknown, either, to American politicians from "Boss" Curley of Boston¹⁰⁴ to Nelson D. Rockefeller of New York.¹⁰⁵ It is also understood by the fledgling bureaucracy of the international system.

There are many other examples of ritual and other symbolic reinforcement of legitimacy in the international system. Thus, the United Nations Organization is authorized to fly its own flag, not only at headquarters, but also over regional and local offices around the world.¹⁰⁶ The flag has been used at the instigation of the Secretary-General to immunize such UN battle-front operations as clearing sunken ships from the Suez Canal in 1956

¹⁰² Kurtz, *supra* note 81, at 310.

¹⁰³ Although many consider the pyramids to be solely the product of slave labor, evidence has been advanced indicating that the labor was in fact compensated. Thus, it is "probably nearer the truth [to] regard these monuments as vast public works providing economic security for a good part of the population." H. JANSON, *THE HISTORY OF ART* 40 (rev. ed. 1969). Erected as part of vast funerary districts, the pyramids were the scene of great religious festivities, both during and after the Pharaoh's lifetime. *Id.* at 38. At least as far as Old Kingdom pyramids are concerned, Pharaohs equipped their tombs as a "kind of shadowy replica of [their] daily environment for [their] spirit[s]. . . . [T]he Egyptian tomb was a kind of life insurance, an investment in peace of mind." *Id.* at 35.

¹⁰⁴ See J. DINNEEN, *THE PURPLE SHAMROCK* (1949) (which details the life of James Michael Curley, four-time mayor of Boston). See also E. O'CONNOR, *THE LAST HURRAH* (1956) (which, although fictional, is said to be based on Curley's life and career).

¹⁰⁵ In formulating the project for the Albany Mall, Governor Nelson Rockefeller suggested modeling New York's capitol on the palace of the Dalai Lama at Lhasa, Tibet. The revised version of the mall's plan incorporated architectural and symbolic elements from Lhasa, Washington, D.C., Brasília, Versailles, Rockefeller Center and St. Petersburg, and was meant to be "the most spectacularly beautiful seat of government anywhere in the world." Krinsky, *St. Petersburg-on-the-Hudson: The Albany Mall* (citing *FORTUNE*, June 1971, at 92), in M. BARASCH & L. SANDLER, *ART THE APE OF NATURE* 771, 778 (1981).

¹⁰⁶ The General Assembly adopted and authorized the use of the United Nations flag on Oct. 20, 1947. See GA Res. 167, 2 UN GAOR (96th plen. mtg.) at 338-39, UN Doc A/414 (1947).

and protecting members of the Palestine Liberation Organization being evacuated from Lebanon in 1983.¹⁰⁷ The United Nations also issues stamps,¹⁰⁸ which not only are accepted for mail delivery by member states, but also generate a tidy independent income—some \$8.6 million in 1986–1987.¹⁰⁹ Peacekeeping forces and truce observers under UN command and wearing UN symbols are stationed between hostile forces in Kashmir,¹¹⁰ the Golan Heights,¹¹¹ Cyprus,¹¹² Lebanon¹¹³ and Iran-Iraq.^{113a} They are lightly armed, if at all, and palpably unable to defend themselves in the event of renewed hostilities; but, with their distinctive emblems, they have come to symbolize the world's interest in the continuance of an agreed truce or armistice. The blue and white helmets and arm bands also symbolize a growing body of rules applicable to peacekeeping operations, manifesting and reinforcing the authority of forces that usually are neither as numerous, nor as well armed, as those they must keep pacified. Their role is purely, but effectively, symbolic of the desire of bitter enemies—and the international community—to have respite from combat. Yet their token presence has a far more inhibitory effect on the behavior of states than can be explained by their minimal coercive power.¹¹⁴ It is their perceived legitimacy, symbolically validated, that serves as their shield and usually induces more powerful forces to defer to their intangible authority.

The United Nations and its agencies also maintain headquarters and regional facilities that are accorded limited extraterritoriality and immuni-

¹⁰⁷ For the Secretary-General's operation to remove ships sunk in the Suez Canal during the 1956 war, see 1956 UN Y.B. 53–55; and GA Res. 1121, 11 UN GAOR Supp. (No. 17) at 61, UN Doc. A/3386 (1956). The Secretary-General also authorized, with the "support" of the Security Council, the flying of the UN flag on ships that would evacuate armed elements of the PLO from Tripoli. See UN Docs. S/16194, S/16195, 38 UN SCOR (Res. & Dec.) at 5–6, UN Doc. S/INF/39 (1983).

¹⁰⁸ The United Nations Postal Administration was established on Jan. 1, 1951. See GA Res. 454, 5 UN GAOR Supp. (No. 20) at 57–58, UN Doc. A/1775 (1950).

¹⁰⁹ The estimated 1986–1987 net revenue from the sale of postage stamps was \$8,667,700. See Advisory Committee on Administrative and Budgetary Questions, First Report on Proposed Programme Budget for the Biennium 1986–1987, 40 UN GAOR Supp. (No. 7) at 209, UN Doc. A/40/7 (1985).

¹¹⁰ The origin of the United Nations Military Observer Group in India and Pakistan (UNMOGIP) is found in a resolution of the UN Commission for India and Pakistan. See 3 UN SCOR Supp. (Nov. 1948) at 32, UN Doc. S/1100, para. 75 (1948). The Security Council subsequently authorized its operation. See SC Res. 91, para. 7, 6 UN SCOR (Res. & Dec.) at 1, 3, UN Doc. S/INF/6/Rev.1 (1951).

¹¹¹ The Security Council established the UN Disengagement Observer Force (UNDOF) for the Golan Heights on May 31, 1974. See SC Res. 350, 29 UN SCOR (Res. & Dec.) at 4, UN Doc. S/INF/30 (1974).

¹¹² The United Nations Force in Cyprus (UNFICYP) was formed by the Security Council on Mar. 4, 1964. See SC Res. 186, 19 UN SCOR (Res. & Dec.) at 2–4, UN Doc. S/INF/19/Rev.1 (1964).

¹¹³ The United Nations Interim Force in Lebanon (UNIFIL) was created by the Security Council on Mar. 19, 1978. See SC Res. 425, 33 UN SCOR (Res. & Dec.) at 5, UN Doc. S/INF/34 (1978).

^{113a} See Report of the Secretary-General, UN Doc. S/20093 (Aug. 7, 1988); SC Res. 619 (Aug. 9, 1988) (creating the force); GA Res. 42/233 (Aug. 17, 1988) (funding the force).

¹¹⁴ For a discussion of the noncoercive role of UN peacekeeping forces, see B. URQUHART, *A LIFE IN PEACE AND WAR* 287–88, 342–43 (1987).

ties.¹¹⁵ These have symbolic as well as practical significance. The extension of diplomatic immunity to top UN officials, privileges usually reserved for representatives of states, symbolizes the emergence of the Organization as an autonomous international actor, pedigreed in its own right. The functions and privileges of the agencies' resident representatives in various countries do not differ greatly, in practice, from those of ambassadors. Although it is not widely known, the Organization also levies an income tax¹¹⁶ (staff assessment) on its employees who, with the exception of Americans, are immune from national taxation in recognition of the fact (noted by the U.S. Supreme Court in the domestic federal context¹¹⁷) that the right of states to tax federal instrumentalities must be limited because it necessarily encompasses the right to destroy.

A few more examples. Symbols of pedigree and rituals are firmly imbedded in state diplomatic practice. The titles ("ambassador extraordinary and plenipotentiary"), prerogatives and immunities of ambassadors, consuls and others functioning in a representative capacity are among the oldest of symbols and rites associated with the conduct of international relations. The sending state, by the rituals of accreditation, endows its diplomats with pedigree. They become, in time-honored tradition, a symbolic reification of the nation ("full powers" or *plenipotentiary*), a role that is ritually endorsed by the receiving state's ceremony accepting the envoy's credentials. These ceremonies, incidentally, are as old as they are elaborate and are performed with as remarkably faithful uniformity in Communist citadels as in royal palaces.¹¹⁸ Once accredited and received, an ambassador is the embodiment of the nation. The status of ambassador, once conferred, carries with it inherent rights and duties that do not depend on the qualities of the person, or on the condition of relations between the sending and receiving states, or on the relative might of the sending state. To insult or harm this envoy, no matter how grievous the provocation, is to attack the sending state. Moreover, when an envoy, acting officially, agrees to something, the envoy's state is bound, usually even if the envoy acted without proper authorization.¹¹⁹ The host state normally is entitled to rely on the word of an ambassador as if his or her state were speaking.

¹¹⁵ See Convention on the Privileges and Immunities of the United Nations, *adopted* by the General Assembly Feb. 13, 1946, 21 UST 1418, TIAS No. 6900, 1 UNTS 1 (entered into force for the United States Apr. 29, 1970). See also Agreement Regarding the Headquarters of the United Nations, June 26, 1947, United States-United Nations, 61 Stat. 3416, TIAS No. 1676, 11 UNTS 11 (entered into force Nov. 21, 1947). See further Convention on the Privileges and Immunities of the Specialized Agencies, *approved* by the General Assembly Nov. 21, 1947, 33 UNTS 261.

¹¹⁶ To rectify the inequalities it perceived in its original system of compensation, the United Nations subjected UN salaries to a tax assessed at a rate comparable to the employee's national income tax liability. GA Res. 239 (III), UN Doc. A/703, at 3 (1948), *as amended* by GA Res. 359 (IV), UN Doc. A/1949, at 1 (1949).

¹¹⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 347 (1819).

¹¹⁸ See M. McCaffree & P. Innis, *PROTOCOL, THE COMPLETE BOOK OF DIPLOMATIC, OFFICIAL AND SOCIAL USAGE* 87-104 (1985).

¹¹⁹ *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 PCIJ (ser. A/B) No. 53 (Judgment of Apr. 5).

The venerable ritual practices of diplomacy are almost universally observed, and the rules that govern diplomacy are widely recognized as imbued with a high degree of legitimacy, being both descriptive and predictive of nearly invariable state conduct and reflecting a strong sense of historically endowed obligation. When the rules are violated—as they have been by Iran and Libya in recent years¹²⁰—the international community tends to respond by rallying around the rule, as the Security Council¹²¹ and the International Court of Justice¹²² demonstrated when the Iranian regime encouraged the occupation of the U.S. Embassy in Tehran. Violations of the elaborate rules pertaining to embassies and immunities usually lead the victim state to terminate its diplomatic relations with the offender.¹²³ The offended state—as Britain demonstrated after the St. James Square shooting—usually takes care not to retaliate by means that the rules do not permit.¹²⁴

Related to the pedigreering process of diplomatic accreditation, with its symbolic status of privileges and immunities, is the prevalent idea of sovereign immunity. That set of rules and practices has its roots in the medieval notion that the “king can do no wrong” and the monarch’s claim that “I am the state.” Nowadays, most governments can be sued in their own courts. Until at least the 1920s, however, nations, among themselves, generally continued to treat as sacrosanct not only foreign governments, but also all property of recognized foreign states and those activities and enterprises carried on in the foreign government’s name.¹²⁵ Only in the last three

¹²⁰ For a discussion of the Iranian hostages incident, see Gross, *The Case of United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures*, 74 AJIL 395 (1980). For an analysis of the Libyan violations, see Higgins, *supra* note 30.

¹²¹ SC Res. 457, 34 UN SCOR (Res. & Dec.) at 24, UN Doc. S/INF/35 (1979) (adopted unanimously).

¹²² See *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Provisional Measures, 1979 ICJ REP. 7 (Order of Dec. 15); *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 ICJ REP. 3 (Judgment of May 24); *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1981 ICJ REP. 45 (Order of May 12).

¹²³ See, e.g., *France Breaks Iran Ties and Isolates Embassy*, N.Y. Times, July 18, 1987, at 1, col. 3, which followed the grant of sanctuary by the Iranian Embassy in Paris to a nondiplomat wanted for questioning in connection with terrorist activities.

¹²⁴ The British limited their reaction to the shooting of a policewoman from the premises of the Libyan People’s Bureau to expulsion of the perpetrators and closing of the Bureau. See Higgins, *UK Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities and Privileges: Government Response and Report*, 80 AJIL 135 (1986).

¹²⁵ In the *Steamship Pesaro* case, the U.S. Supreme Court refused to recognize the difference between ships held and used by a government for a public purpose and ships used by a government in trade. The latter “are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.” *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 574 (1926). The Court expounded upon this doctrine in *The Navemar*, holding that, “[a]dmittedly a vessel of a friendly government in its possession and service is a public vessel, even though engaged in the carriage of merchandise for hire” *Compania Espanola de Navigacion Maritima, S.A. v. Navemar*, 303 U.S. 68, 74–76 (1938). For similar holdings in British cases, see *The Jassy*, 1906 P. 270; and *The Gagara*, 1919 P. 95.

decades have most nations begun to limit the immunity from suit of foreign governments and state commercial entities. While many nations now have restricted this status-based right of immunity by withdrawing it from purely *commercial* property and activities of foreign governments,¹²⁶ immunity continues to be granted to all officials and property engaged in *governmental* (public, or noncommercial) undertakings.¹²⁷ In practice, this means that immunity protects such officials, state property and governmental activity from legal action or, at a minimum, from the execution of a judgment against them.

Symbolically validated rules like these, precisely because they are old, or have been encrusted with quaint forms and rituals, seem easy prey to functionalist critique. They sometimes work an injustice, and they often appear anachronistic. On the other hand, a new rule, even if agreed upon, might not have the same capacity to obligate. To the extent that the legitimacy of a rule is dependent on symbolic validation, there is reason—albeit not invariably a decisive one—to leave the rule alone.

Symbols, ritual and pedigree are factors that cannot be made to order and rules endowed with them need to be husbanded. “No one makes up ritual or symbol any more than anyone makes up language,” a study of ancient Chinese ritual has shown.

Ritual and symbol arise without intention or adaptation to conscious purpose; they seem to be collective products worked out . . . over long periods of time. . . . Ironically, it appears that rituals and symbols must in some way already be regarded as “legitimate” in order for them to confer legitimacy on those who employ them.¹²⁸

IV. COHERENCE AND LEGITIMACY

Symbolic validation, like determinacy, serves to legitimize rules. But like determinacy, symbolic validation is not quite as simple a notion as it may initially appear. For example, as traditional Chinese practice makes clear, ritual invoked to enhance the capacity of a rule to compel compliance will

¹²⁶ The United States officially promulgated this policy in 1952, when the Department of State, by means of the “Tate letter,” declared its adherence to the “restrictive theory” of sovereign immunity. Under this theory, immunity would be recognized with regard to sovereign or public acts (*jure imperii*) but not with respect to private acts (*jure gestionis*). Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Philip B. Perlman, Acting Attorney General, May 19, 1952, reprinted in 26 DEPT. ST. BULL. 984 (1952). For current European treatment of immunity, see the European Convention on State Immunity and Additional Protocol, 1972 ETS 74, reprinted in 11 ILM 470 (1972).

¹²⁷ Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1602–1611 (1982). See also Higgins, *Recent Developments in the Law of Sovereign Immunity in the United Kingdom*, 71 AJIL 423 (1977). For judicial discussion of current U.S. practice and its history, see Broadbent v. Organization of Am. States, 628 F.2d 27 (D.D.C. 1980). U.S. application of the “commercial” activity concept under the doctrine of restrictive immunity is discussed in *id.* at 33–35; and the immunity accorded international organizations under the rubrics of restrictive and absolute immunity is treated in *id.* at 30–33.

¹²⁸ H. WECHSLER, *supra* note 80, at 35.

only succeed if the rituals are themselves legitimate and are strictly observed. Similarly, a pedigree only confers actual rights and duties when the standards for pedigreeing are applied *coherently*. When, on the contrary, symbols, ritual and pedigree are dispensed capriciously, the desired effect of legitimization may not accrue.

Both determinacy and symbolic validation are connected to a further variable: coherence. The effect of incoherence on symbolic validation can be illustrated by reference to diplomatic practices pertaining to the ritual validation of governments and states. The most important act of pedigreeing in the international system is the deep-rooted, traditional act that endows a new government, or a new state, with symbolic status. When the endowing is done by individual governments, it is known as *recognition*.¹²⁹ The symbolic conferral of status is also performed collectively through a global organization like the United Nations when the members vote to admit a new nation to membership,¹³⁰ or when the General Assembly votes to accept the credentials of the delegates representing a new government.¹³¹

These two forms of validation are important because they enhance the status of the validated entity; that is, the new state or government acquires legitimacy, which, in turn, carries entitlements and obligations equal to those of other such entities. Such symbolic validation cannot alter the empirically observable reality of power disparity among states and governments, nor, properly understood, does it give off that cue. It does, however, purport to restrict what powerful states legitimately may do with their advantage over the weak. It is a cue that prompts the Soviets, however reluctantly, to do a lot of explaining when they invade Afghanistan. The pedigreed statehood of Afghanistan, together with the determinacy of the rules against intervention by one state in the internal affairs of another, then combine to render those Soviet explanations essentially unacceptable, global scorn evidencing the inelastic determinacy of the applicable rules. The practices of symbolic equality conferred by recognition also stipulate that the leader of tiny Bhutan must receive exactly the same number of volleys fired in salute as does the head of state of its huge neighbor, China. Recognition, as validation, has the effect of cuing the equal capacity of rich and poor, strong and weak, for acquiring rights and duties. It creates a presumption against all purported interpretations of existing rules—and against proposed new rules—that would make arbitrary distinctions between the rights and duties of different states or governments. Symbolic equality thus both affirms and reinforces real equality. Weaker nations, in particular, believe that ritual incantation of their symbolically validated status, at a minimum, has reduced somewhat the option of the powerful to treat the weak as tributary or

¹²⁹ For U.S. practices, see L. GALLOWAY, *RECOGNIZING FOREIGN GOVERNMENTS: THE PRACTICE OF THE UNITED STATES* (1978). An excellent treatment of recognition in general can be found in H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* (1947).

¹³⁰ J. DUGARD, *RECOGNITION AND THE UNITED NATIONS* (1987).

¹³¹ See *infra* note 140 for illustrations of the converse, attempts to deny or rescind recognition by opposing delegates' credentials.

vassal states in contravention of the rights inherent in their status as states.¹³²

These important benefits only accrue if the validation is effective; and it is only effective if the forms and standards have been followed.

Each kind of pedigreeing has its own rules and standards. No cue, no amount of ritual behavior, can achieve symbolic validation if its prescribed procedures are not followed or its public standards are violated. Graham Greene's "whisky priest" may have lost his faith,¹³³ but as long as he follows the rites, he remains an effective validator. Prescribed standards are the essential element in symbolic validation. For example, in 1948, the International Court of Justice was asked by the General Assembly to designate the test for admitting candidate states to UN membership.¹³⁴ The Court replied, essentially, by reciting the rules established by Article 4 of the UN Charter: that an applicant must be a state, peace loving, willing to accept the obligations of the Charter, able to carry them out, and willing to do so. The Court further explained that these were "not merely . . . the necessary conditions, but also . . . the conditions which suffice."¹³⁵ In other words, nations that objectively satisfy that standard are entitled to have their status validated. The standard is itself pedigreed by its inclusion in the UN Charter, the world's most inclusive multilateral treaty, and by its deep historical rootedness in analogous national recognition practices.¹³⁶

Similarly, the legal adviser to the Secretary-General prepared a memorandum explaining the rules applicable to accepting or rejecting the credentials of a delegation when there is doubt about their validity, for example, during a civil war when there may be two adversary claimants. In such situations, too, UN members should be guided by Charter Article 4, the legal adviser said. Moreover,

[w]here a revolutionary government presents itself as representing a State, in rivalry to an existing government, the question at issue should be which of these two governments in fact is in a position to employ the resources and direct the people of the State in fulfilment of the obligations of membership. In essence, this means an inquiry as to whether the new government exercises effective authority within the territory of the State and is habitually obeyed by the bulk of the population.¹³⁷

¹³² For example, a pledged word commits powerful as well as weak governments. There is widespread recognition by states, antedating the UN Charter, that a commitment equally obligates powerful, as weaker nations. See *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 PCIJ (ser. A/B) No. 53, at 22 (Judgment of Apr. 5).

¹³³ Greene shows that even though a priest may fall into a secularized life style, he retains his spiritual powers. A "whisky priest" is "a damned man putting God into the mouths of men," owing to his authority to perform communion. See G. GREENE, *THE POWER AND THE GLORY* 83 (1940).

¹³⁴ Admission of a State to the United Nations (Charter, Art. 4), 1948 ICJ REP. 57 (Advisory Opinion of May 28).

¹³⁵ *Id.* at 62, 63.

¹³⁶ See I L. OPPENHEIM, *supra* note 77, at 124-52.

¹³⁷ Letter to Trygve Lie, Mar. 8, 1950, Legal Aspects of the Problems of Representation in the United Nations, 5 UN SCOR Supp. (Jan.-May 1950) at 18, 22-23, UN Doc. S/1466 (1950).

Governments that do are eligible; those that do not are not. These standards are also rooted in venerable national recognition practices.

These standards for symbolic validation at the United Nations, like any rules, leave room for differences of interpretation in borderline cases where "willingness to carry out obligations" and "control over territory and population" are not wholly self-evident. Nevertheless, the standards have a fairly high degree of formal determinacy and are not difficult to understand, making it possible to dismiss bogus, self-serving interpretations. For example, it is surely not permissible to vote to deny membership to a new state on the ground that its president is black or that its inhabitants are poor. The standards also explain why even ardent Palestinian and Sahrawian representatives have not yet sought membership in the United Nations.

When the symbolic validation proceeds legitimately in accordance with its own prescription—when these rules are followed—it succeeds in its purpose. If validation is withheld in conformity with the same standards, the rejected candidate will be denied the hallmark of effective statehood. The legitimate refusal of governments, individually, and collectively in the United Nations, to validate the Bantustan "homelands"—which clearly do not meet the standard—has undoubtedly contributed to those pseudo-nations' failure to achieve the status of membership and equality in the international community.¹³⁸ Problems arise, however, when the standards are not applied coherently; that is, when they are applied to some but not to others equally entitled, or when the standards cease to be connected to principles of general applicability. For example, the United States Government led the fight that, for years, allowed the Nationalist regime on Taiwan, and not the Communist regime in Beijing, to occupy the Chinese seat in UN organs, on the ground that this "is a privilege and not a right."¹³⁹ The United States meant that symbolic validation could be withheld from the Beijing Government, even though it obviously met the traditional criteria, because those could be overridden by political considerations. More recently, African and Arab members of the General Assembly have led efforts to reject the credentials of the delegations from South Africa and Israel¹⁴⁰

¹³⁸ The General Assembly condemned the establishment by South Africa of Bantu homelands (Bantustans) as an attempt artificially to divide the African people into "nations" according to their tribal origins, with the aim of weakening the African front in its struggle for its inalienable and just rights. GA Res. 2775E, 26 UN GAOR Supp. (No. 29) at 42, UN Doc. A/8429 (1971). The resolution passed by the resounding vote of 110 in favor, 2 opposed, with 2 abstentions. See also Report of the Secretary-General, UN Doc. A/8388 (1971) (transmitting consensus adopted on Sept. 13, 1971, by joint meeting of the Special Committee on *Apartheid*, the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, and the United Nations Council for Namibia); Dugard, *South Africa's "Independent" Homelands: An Exercise in Denationalization*, 10 DEN. J. INT'L L. & POL'Y 1-1 (1980) (for the development of the Bantustan policy).

¹³⁹ State Department Memorandum, *U.S. Policy on Nonrecognition of Communist China*, 39 DEP'T ST. BULL. 385 (1958).

¹⁴⁰ GA Res. 3207, 29 UN GAOR Supp. (No. 31) at 2, UN Doc. A/9631 (1974) (resolution on South Africa). When, in 1982, the Arab bloc decided to challenge the credentials of the

even though there is no question that these do meet the criteria for representing their respective countries. The General Assembly, with the support of the United States and a majority of Western and Third World nations, has also continued to seat the delegation of the Kampuchean regime headed by Prince Sihanouk even though it fails to control any significant part of the territory of the country it claims to represent. At least those who are responsible for the Kampuchean result have sought to justify themselves by proposing a new general rule: that a regime, even if it is in effective control, should not be rewarded for having been installed by foreign aggression.¹⁴¹ That new rule may eventually acquire pedigreed legitimacy, but it has not done so as yet.

When the process of symbolic validation is abused by failure to follow its own procedural rules and standards, a divergence is likely to occur between the real world and the symbolic world, to the detriment of the status-validating processes and symbols. They may cease to be taken seriously. For example, at a time when the Chinese Communist regime was still being excluded from the United Nations, Secretary-General Dag Hammarskjöld nevertheless engaged in numerous important negotiations with Chou En-lai, Beijing's foreign minister.¹⁴² The head of the UN Secretariat, it seems, did not feel constrained by the members' decision denying validation to the Communist authorities. Similarly, Hammarskjöld's successor, U Thant, vigorously pressed his negotiations with Hanoi during the Vietnam War,¹⁴³

Israeli delegation, the United States announced it would boycott any UN body that excluded the Israelis and would also withhold its contribution amounting to 25% of the UN budget. T. FRANCK, *NATION AGAINST NATION* 217 (1985). Most recently, Oman, acting on behalf of 20 Arab states, proposed an amendment to exclude the credentials of Israel from General Assembly approval. The General Assembly voted not to act on this amendment. *Credentials Committee Reports Adopted*, UN CHRON., No. 1, February 1987, at 16. See also Halberstam, *Excluding Israel from the General Assembly by a Rejection of its Credentials*, 78 AJIL 179 (1984).

¹⁴¹ Credentials of Representatives to the Forty-first Session of the General Assembly: First Report of the Credentials Committee, UN Doc. A/41/727, para. 12 (prov. ed. 1986).

The representative of the United States of America stated that the credentials of the representatives of Democratic Kampuchea were in order, fulfilled the requirements of rule 27 of the rules of procedure, had already been accepted by the General Assembly in the past and should be accepted at the current session. The suggested alternative was a regime brought to power by a foreign military invasion and that was clearly not representative in any way, shape or form of the Kampuchean people.

Id.

¹⁴² The Secretary-General conducted a series of talks with Chou En-lai "in the name of the United Nations" (see GA Res. 906, 9 UN GAOR Supp. (No. 21) at 56, UN Doc. A/2890 (1954)) in order to discuss the release of four U.S. fighter pilots shot down near the Yalu River between October 1952 and January 1953, while they were flying missions for the UN Command during the Korean War. See 2 PUBLIC PAPERS OF THE SECRETARIES-GENERAL OF THE UNITED NATIONS: DAG HAMMARSKJÖLD (1953-1956), at 415-59 (1972), for details of the Secretary-General's mission. See also T. FRANCK, *supra* note 140, at 136-37.

¹⁴³ In 1964 U Thant secretly informed President Johnson that he could arrange a meeting between the United States and North Vietnam. Believing he had secured the President's blessing, he proceeded to use his good offices to arrange a meeting in Rangoon. But when the United States failed to respond once the meeting had been agreed to by the North Vietnamese,

even though the UN political organs had never validated the nation of North Vietnam, let alone its governmental representatives.¹⁴⁴ The refusal to seat the South African delegates to the General Assembly likewise has not prevented Secretary-General Pérez de Cuéllar from negotiating with Pretoria over such matters as the future of illegally occupied Namibia.¹⁴⁵ With whom else, after all, *could* he negotiate that question?

To recapitulate: an act of recognition, the symbolic validation of a state or regime, has the capacity to bestow, symbolically, rights and duties on the recognized entity when, *but only if*, it is done in accordance with the applicable principled rules and procedures. Such pedigreed recognition, and its corporate UN equivalent, is everywhere accorded great weight. On the other hand, when the rules and standards for validation are violated, or are themselves unprincipled and capricious, then symbolic validation fails in its objective of bestowing status. Moreover, when validation is seen to be capricious, a failure to validate will do more to undermine the legitimacy of the validating process than of the state or government thus deprived of symbolic validation.

The failure of mystical ritual to do what it is invoked for is usually explained metaphysically. The excommunicate priest who elevates the host before the altar in a fraudulent Eucharist is left holding only bread and wine because his invalid orders cannot effect the miracle of transubstantiation. But failed validation can often be explained rationally. For example, the Ukraine has not been transformed into a sovereign and equal state by its membership in the United Nations. Membership held at variance with the Organization's own standards does not validate the Ukraine's statehood.¹⁴⁶ Similarly, when the United Nations wishes to engage in relief activities in Kampuchea, its officials do not deal with the symbolically validated government of Prince Sihanouk but, rather, with the "unrecognized" regime actually in control. The perverse use of validation, in both instances, fails to give or withhold status for reasons that are practical, rational and not in the least

Thant felt humiliated by the U.S. Government and leaked his story to the world. T. FRANCK, *supra* note 140, at 154-58.

¹⁴⁴ The People's Republic of China was admitted to the United Nations on Oct. 25, 1971, and Vietnam acquired membership only in 1977.

¹⁴⁵ For an account of how the Security Council directed Secretary-General Waldheim "to initiate as soon as possible contacts with all parties concerned" so that the people of Namibia might exercise their right to self-determination and independence, see D. SOGGOT, *NAMIBIA: THE VIOLENT HERITAGE* 53-54 (1986).

¹⁴⁶ Despite the fact that the Soviet Constitution guarantees individual republics the right to secede from the Soviet Union, it was widely known that the Ukraine, like each of its sister republics, was considerably less independent than any American state and thus was otherwise ineligible for UN membership. Nonetheless, the West ultimately acceded to the Soviet request to admit two republics as UN members because it was viewed as a reasonable price to pay for Soviet participation in the United Nations. T. FRANCK, *supra* note 140, at 21. For a detailed history of the negotiations leading to the West's disposition of Stalin's initial request for membership for all 16 Soviet republics, see R. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER* 435, 533, 536-37, 539 n.49, 584, 597-98, 636 (1958).

metaphysical. If the valid procedural rules or standards are not applied, it is to be expected that no legitimacy will be conferred.

The costs to its legitimacy of applying a rule incoherently arise in three related, but different, senses. First, incoherence nullifies the flawed act of validating or withholding validation. Second, it undermines the standards, rules and processes for bestowing status or validity. Third, it derogates from the legitimacy of the institution that is charged with validating. Thus, in the UN context, when the General Assembly fails to follow the Organization's own rules, standards or procedures for accrediting delegates, it damages the claim of the whole UN system to be taken seriously as the symbolic bestower of status.

Dworkin has pointed out that coherence (he uses the term "integrity")¹⁴⁷ is a key factor in explaining why rules compel.¹⁴⁸ He observes that a rule is coherent when like cases are treated alike in application of the rule and when the rule relates in a principled fashion to other rules of the same system. Consistency requires that a rule (or, as we have noted, a ritual or standard), whatever its content, be applied uniformly in every "similar" or "applicable" instance. The opposite is what Dworkin calls "checkerboarding."¹⁴⁹

There is another aspect of coherence. It encompasses the further notion that a rule, standard or validating ritual gathers force if it is seen to be connected to a network of other rules by an underlying general principle. This latter aspect of coherence merits closer examination.

Let us imagine that it has been generally agreed that the \$1,010 billion debt of Third World states¹⁵⁰ should be retired by the borrowers' paying the lenders half the total amount owed. Both sides regard this compromise as the best deal they can get in present circumstances. The problem is one of coverage. How is the 50 percent repayment formula going to be implemented in practice? Who will repay what? Suppose it were suggested that states whose names begin with the letters A-M should repay their entire debt, while those whose names start with N-Z pay nothing. Such a rule has determinacy. Although some will fare better than others, no borrower state will be worse off with the compromise than without it. The compromise is also better for the lenders than being repaid nothing, and better for the borrowers than having to repay everything. Yet any such "checkerboard" compromise is likely to be rejected by both borrowers and lenders because of its manifest incoherence. Its incoherence makes it facially illegitimate.

To be legitimate, Dworkin points out, such a compromise must "aim to settle on some coherent principle whose influence then extends to the natural limits of its authority."¹⁵¹ That means the compromise must connect what it does with some *rational principle of broader application*. The alphabetic

¹⁴⁷ R. DWORKIN, *supra* note 7.

¹⁴⁸ *Id.* at 190-92.

¹⁴⁹ *Id.* at 179.

¹⁵⁰ INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, WORLD DEBT TABLES, EXTERNAL DEBT OF DEVELOPING COUNTRIES, 1985-86, at xi (1986).

¹⁵¹ R. DWORKIN, *supra* note 7, at 179.

compromise asserts a principle that distinguishes between countries—those which must repay and those to be forgiven—by means of a general principle that cannot be defended on any rational basis. The alphabetic compromise, like the flipping of a coin, is an admission that no rational principle can be found that will produce the desired result. Thus, the decision is left to chance: the “draw” of the alphabet. This establishes no generalizable rule, no principle to justify the basis for making a decision. It lacks coherence because it lacks nexus: both in logic and, more important, in practice. It fails to connect to a rational principle in general use. It establishes no basis for a continuing pattern of systemic interaction; it connects the particular decision to no sense of ongoing community. Even if there were other debt crises in the future, the alphabetic approach would merely become more indefensible as it lost its one vestigial merit: its randomness. Nothing in international life is ever resolved, or likely to be solved, by recourse to the alphabetic principle except seating arrangements at multinational conferences.

A coherent half-loaf compromise could be achieved by applying any one of various coherent, principled approaches. For example, debt forgiveness could be distributed on a sliding scale based on national income or on per capita productivity, the inverse of the scale of assessment used to tax UN members. Or each debtor's indebtedness could be reduced by a fixed percentage, as in a bankruptcy reorganization. Or all repayments could be stretched out in accordance with a schedule based on rise in productivity. Any of these methods of implementing the half-loaf compromise connects with a principle of distribution that commends itself rationally and has been, and will be, applied elsewhere. Coherence requires that the rule applied to a dispute about the distribution of debt relief should employ distinctions that are acceptable (or, at least, not unacceptable) in solving not only future instances of the same problem but also quite different distributive problems.

Dworkin illustrates the potency of coherence as a factor in legitimacy by asserting that a half-loaf regulation is even less acceptable than no loaf at all when it produces a checkerboard result. “Even if I thought strict liability for accidents wrong in principle,” he has written, “I would prefer that manufacturers of both washing machines and automobiles be held to that standard rather than that only one of them be. I would rank the checkerboard solution not intermediate between the other two [no strict liability and universal strict liability] but third, below both, and so would many other people.” Such “compromises are wrong, not merely impractical.”¹⁵² They are lacking in legitimacy.

A rule taxing only property with even-numbered addresses would be incoherent and lack legitimacy. The same rule would be perfectly coherent if odd-numbered properties, all being on the same side of each street, had received a 20-year tax abatement in return for yielding several feet of their frontal property to the city for the widening of roadways. A “selective service” lottery for induction into the armed services employs a purely random military draft, which may be justified as the fairest way to allocate a

¹⁵² *Id.* at 182.

social burden in some circumstances. In other words, before a rule that is facially inconsistent in its application can be adjudged incoherent, it is necessary to determine not only that it applies unequally but also that no reasonable principle of general application can justify the inequality. If a rule is unequally applied, its legitimacy is placed in question. If the inequality is also unprincipled, the legitimacy of the rule—its capacity to obligate—will be severely depleted.

The idea that coherence is a key indicator of legitimacy may be illustrated further by reference to three recent developments in the international community: the emergence of a "right" to *self-determination*; the development of a notion of *state equality*, as exemplified by the voting system of the United Nations; and the entrenchment of free and nondiscriminatory terms of trade—the *most-favored-nation* system—in the General Agreement on Tariffs and Trade. Each has undergone a crisis of legitimacy occasioned by challenges to its normative coherence. Let us examine how each has attempted to meet that challenge and thus to protect its legitimacy.

The notion that national or ethnic groups are entitled to "self-determination" had its origins in the settlements made at the end of World War I. The U.S. delegation to the Versailles Peace Conference was firmly instructed to apply ethnic criteria to resolve all European territorial disputes and, to that end, President Woodrow Wilson saw to it that his team included historians, geographers and ethnologists.¹⁵³ Throughout the negotiations, Wilson insisted that settlements be based on "facts,"¹⁵⁴ by which he meant "racial aspects, historic antecedents, and economic and commercial elements."¹⁵⁵ Note, however, in passing, that this general principle need not be accepted as *just*. The legitimacy of a rule is conditioned by its coherence, but a rule may be quite coherent (in our sense of the term), as well as highly determinate and symbolically validated, and yet be thought unjust. Wilsonian self-determination, for example, may be legitimate yet work an injustice by transferring territories and resources in accordance with a general principle of ethnicity while ignoring considerations of economic well-being and the distributive claims of poor people.¹⁵⁶

The Wilsonian principle achieved considerable coherence in the immediate period following World War I. Insistence on its application led to a plebiscite in Schleswig, which had been annexed by Prussia in 1864.¹⁵⁷ In 1920, Northern Schleswig voted to revert to Denmark, a verdict accepted by the Peace Conference.¹⁵⁸ The same principle governed the creation of Czechoslovakia, in accordance with the wishes of Wilson's Secretary of State Lansing, "that all branches of the Slav race should be completely freed from German and Austrian rule."¹⁵⁹ Similarly, the principle was used by Wilson

¹⁵³ R. S. BAKER, *WOODROW WILSON AND WORLD SETTLEMENT* 109 (1922).

¹⁵⁴ *Id.* at 187.

¹⁵⁵ *Id.*

¹⁵⁶ Franck & Hawkins, *Rawls' Theory of Justice in International Context*, 10 MICH. J. INT'L L. (1988).

¹⁵⁷ S. WAMBAUGH, *PLEBISCITES SINCE THE WORLD WAR* 14 (1933).

¹⁵⁸ 2 A HISTORY OF THE PEACE CONFERENCE OF PARIS 205 (H. W. V. Temperley ed. 1920).

¹⁵⁹ 4 *id.* at 261 (1921).

to oppose efforts by France to create a buffer Rhenish Republic¹⁶⁰ between itself and Germany. Wilson's chief adviser, Colonel House, was scornful of the French, who "do not seem to know that to establish a Rhenish Republic against the will of the people would be contrary to the principle of self-determination."¹⁶¹ The compromise accommodated some elements of both French geopolitics and American moralism. A Saar buffer was established. However, it was not to be independent but administered through the League of Nations. Although the inhabitants were not allowed to be represented in the German Reichstag, their schools, language, laws and German nationality were left untouched.¹⁶²

The principle of self-determination was also used in drawing the boundaries of an independent Poland on incontrovertible historical and ethnic grounds.¹⁶³ Wilson succeeded in his demand that the new Polish state "should be erected" to "include the territories inhabited by indisputably Polish populations."¹⁶⁴ Finally, Upper Silesia was divided by the League Council in 1921 along strictly ethnic lines.¹⁶⁵

The coverage, in practice, of the concept of self-determination after World War I should not be exaggerated by dwelling exclusively on these dramatic instances. The rule was extended only—and, at that, imperfectly—to the European territories of the vanquished powers. It was not applied, for example, to the dispute between Sweden and Finland over the Åland Islands.¹⁶⁶ The commission of inquiry appointed to settle that problem instead declared that "the principle had not yet attained the status of a positive rule of international law."¹⁶⁷ On the other hand, Britain claimed to be motivated by self-determination in the partition of Ireland.¹⁶⁸

After World War II, however, the self-determination principle came to be applied even more generally. The United Nations Charter for the first time expressed a general obligation of states to help enable inhabitants of all dependent non-self-governing territories to make a meaningful choice of national destiny. By joining the United Nations, its members accepted "a sacred trust" to "develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions."¹⁶⁹ Some colonial territories that previously belonged to Germany or Japan were placed under a formal

¹⁶⁰ THE INTIMATE PAPERS OF COLONEL HOUSE 334 (C. Seymour ed. 1928).

¹⁶¹ *Id.* at 345.

¹⁶² 2 Temperley (ed.), *supra* note 158, at 182.

¹⁶³ R. S. BAKER, *supra* note 153, at 110–11.

¹⁶⁴ *Id.*

¹⁶⁵ D. FLEMING, THE UNITED STATES AND WORLD ORGANIZATION 153 (1938).

¹⁶⁶ L. BUCHHEIT, SECESSION 71 (1978). ¹⁶⁷ *Id.*

¹⁶⁸ Linking the issue of Ireland to self-determination, Balfour wrote: "No one can think that Ulster ought to join the South and West who thinks that the Jugo Slavs should be separated from Austria. No one can think that Ulster should be divorced from Britain who believes in self-determination." Balfour, *The Irish Question*, Nov. 25, 1919, PRO CAB 24/93, *quoted in* T. G. FRASER, PARTITION IN IRELAND, INDIA AND PALESTINE 27 (1984). For Lloyd George's comments, see T. G. FRASER, *id.* at 38.

¹⁶⁹ UN CHARTER art. 73.

trusteeship system supervised by the United Nations, which aimed "to promote . . . progressive development towards self-government or independence as may be appropriate," in accordance with "the freely expressed wishes of the peoples concerned."¹⁷⁰

The principle now applied equally to all: to colonies and to Europe, to victors and to vanquished. The first article of the Charter, enumerating the Organization's "Purposes and Principles," specifies an all-embracing obligation of members to develop "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."¹⁷¹ This casts the principle in terms of universal coverage. The term "peoples," moreover, recognizes the importance of the ethnic dimension in determining *who* is entitled to invoke self-determination. No boundary separates "peoples" entitled from "peoples" not entitled. Coherence was achieved and the rule acquired powerful legitimacy.

This is not merely a matter of theory or words. Very few rules of the international system have had as dramatic an impact. Beginning with India, Burma and the Gold Coast, Britain conceded self-determination to nearly one billion persons, with France, the Netherlands, Belgium, Spain and Portugal, albeit at first reluctantly, following suit. With a host of new nations seeking validation, UN membership nearly doubled between 1960 and 1980.¹⁷² This was achieved almost entirely by voluntary compliance in deference to a legitimate rule, rather than by coercion.

The coherence of the rule, however, did not last. Even as these dramatic events were occurring, the same principle of self-determination was being denied all of Eastern Europe. Territories largely inhabited by Latvians, Poles, Germans, Romanians, Hungarians and Slovaks were arbitrarily annexed by neighboring states, and their populations often put to flight. Somewhat later, some of the very nations of a Third World that had just benefited from the application of self-determination refused to join in censuring the Soviet Union and Warsaw Pact nations during the invasion of Hungary in 1956 and of Czechoslovakia in 1968.¹⁷³ Nor was the principle disregarded only in Europe. No sooner had India become independent than its armed forces denied self-determination to the princely state of Kashmir, which might well have been entitled to it on ethnic, religious and legal grounds.¹⁷⁴ So, too, neither independent Nigeria nor the Organization of African Unity felt any obligation to permit self-determination to the ethni-

¹⁷⁰ *Id.* art. 76(b).

¹⁷¹ *Id.* art. 1, para. 2.

¹⁷² UN membership rose from 82 members at the beginning of 1960, 1959 UN Y.B. 539, to 154 by the end of 1980, 1980 UN Y.B. 1347.

¹⁷³ Saudi Arabia, Syria, Yemen, Yugoslavia, Afghanistan, Burma, Ceylon, Egypt, India, Indonesia, Iraq, Jordan, Libya and Nepal abstained from voting on a resolution condemning the 1956 Soviet invasion of Hungary. GA Res. 1004, ES-2 UN GAOR (564th plen. mtg.) at 7, 20, UN Doc. A/PV.564 (1956). Algeria, India and Pakistan abstained from voting on a Security Council resolution condemning the 1968 Soviet invasion of Czechoslovakia. 23 UN SCOR (1443d mtg.) at 28-29, UN Doc. S/PV.1443 (1968).

¹⁷⁴ India Independence Act, 1947, 10 & 11 Geo. 6, ch. 30.

cally and religiously distinct Ibo "nation" when it sought statehood for Biafra.¹⁷⁵

Thus, the principle of self-determination began its descent into incoherence—in the sense of inconsistency of application—almost from the moment of its greatest apparent ascendance. Increasing incoherence became textually evident in 1960 with the General Assembly's adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples.¹⁷⁶ Drafted by the newly independent former colonies of Africa and Asia, it reiterated, on the one hand, "that all peoples have an inalienable right to complete freedom"¹⁷⁷ and demanded immediate implementation of this right "without any conditions or reservations in accordance with their freely expressed will and desire"¹⁷⁸ and regardless of "political, economic, social or educational preparedness."¹⁷⁹ On the other hand, the right was now to be applicable only to "territories which have not yet attained independence." The right was also offset by a new rule against any "attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country."¹⁸⁰

The declaration thus revived the notion of the sanctity of existing boundaries and resistance to secession that informed the U.S. Civil War¹⁸¹ and the decision in the Aaland Island case, but had briefly been disestablished by the notion of self-determination after World War I. In place of a coherent rule, there was now checkerboarding, with self-determination doctrinally sanctioned for some cases and prohibited for others. Not only has the coverage of self-determination shrunk, but also its boundaries—where it is applicable and where not—have become indistinct and incoherent. The standards for granting or withholding the right seem to lack connection to any underlying rational general principles.

This incoherence can be demonstrated by searching for applicable general principles that would justify the inconsistencies in the actual state practice since 1960. For example, Algeria was granted self-determination at the insistence of the world community, while Biafra was not. Is Algeria different from Biafra because the former is separated from France by water, while the latter is a contiguous part of the Nigerian landmass? Surely, this is not a

¹⁷⁵ Biafra declared its independence on May 30, 1967, but only five nations recognized its claim to independence. Neither the United Nations nor the OAU supported Biafran independence and the United Nations never even considered the issue. Nanda, *Self-Determination in International Law*, 66 AJIL 321, 326-27 (1972). See also 66 ASIL PROC. 58, 175 (1972).

¹⁷⁶ GA Res. 1514, 15 UN GAOR Supp. (No. 16) at 66, UN Doc. A/4684 (1960).

¹⁷⁷ *Id.*, Preamble.

¹⁷⁸ *Id.*, Art. 5.

¹⁷⁹ *Id.*, Art. 3.

¹⁸⁰ *Id.*, Art. 5.

¹⁸¹ See, e.g., comments by President Lincoln:

My paramount object in this struggle is to save the Union . . . If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that.

Letter from Abraham Lincoln to Horace Greeley, Aug. 22, 1862, reprinted in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 388 (R. Basler ed. 1953).

principled distinction capable of being generalized. Many nations—the United States, the Philippines, Canada, Indonesia, India, China and the Soviet Union—have provinces or regions separated from the rest of their territory by salt water. Thus, the distance from Hawaii to Los Angeles is five times greater than that from Marseilles to Algiers. Understandably, an ultramarine principle has never been accepted in practice to define the boundaries of self-determination. No government is likely to accept a distinction that would allow the Canadian province of Prince Edward Island to enjoy the right of self-determination but not Quebec.

Other principles for making distinctions between those entitled and those not, encounter equal difficulty. A differentiation between oppressed “peoples” (entitled) and others (not entitled) has a certain moral attraction. But it is not generalizable and certainly fails to account for the actual behavior of states during the past 25 years in supporting or ignoring demands for self-determination. For example, even before their independence, the populations of Nigeria, India, Senegal and the Ivory Coast had far more say in their government than is currently enjoyed by the people of Latvia, Eritrea and the southern Sudan. Yet the international community has championed self-determination for the former, but not for the latter.

Likewise, attempts to introduce an economic variable to rationalize the “checkerboard” application of self-determination tends to be unsuccessful. It has been argued that Biafrans and other Nigerians have fared better by remaining united than they would have done had they separated.¹⁸² But a strong case can also be made that Algeria and France would have prospered more had they remained together. And Katanga has surely suffered economically as a result of its continued union with Zaire, a denial of self-determination that was actually enforced by the United Nations.¹⁸³ The economic factor not only does not rationalize actual state practice, it is also probably bad theory. That economic considerations should or ever *will* trump political, cultural and ethnic ones is a very questionable basis for any agreed general principle.

A more defensible distinction makes self-determination applicable only to “peoples” who are treated *unequally* by government. This principle would

¹⁸² An independent and united Nigeria was perceived to be a “model for Africa,” a “key” to that continent’s future stability and prosperity, because of its material wealth and rich culture. The “progressive Balkanization” of Nigeria, with its concomitant vast waste of human and social resources, was viewed with great anxiety as a tragedy for all Africa. 283 PARL. DEB. (5th ser.) 1367–76 (1967).

¹⁸³ The United Nations completely rejected the claim that Katanga was a sovereign independent nation. See, e.g., SC Res. S/5002, 16 UN SCOR (Res. & Dec.) at 3, UN Doc. S/INF/16/Rev.1 (1961). The United Nations found itself at odds with Katanga. On Apr. 3, 1961, Katanga adopted a Decree on the State of Enmity with the United Nations, reproduced in J. GERARD-LIBOIS, KATANGA SECESSION 335–37 (R. Young trans. 1966), which, inter alia, forbade Katangans to enter into relations of any nature whatsoever with the United Nations or its agents. See also C. C. O’BRIEN, TO KATANGA AND BACK (1962), in which the author, a former representative of the United Nations in Katanga and former member of the Secretary-General’s executive staff, offers a case history of UN experiences with Katanga.

explain why the inhabitants of a colony ruled by Britain or France might be entitled to self-determination, while Latvians or Biafrans were not. Even though preindependence Algeria did elect members to the French Assembly and Senate, the system of communal "colleges" then in operation gave a European vote ten times more weight than an Arab one.¹⁸⁴ Biafrans, by contrast, enjoyed the same rights as other Nigerians. Paradoxically, this basis for distinction may deny the right of self-determination to groups that are more oppressed than some to whom the right would accrue. Latvians, deprived of many basic freedoms, would have no right because they are treated no differently than other disempowered Soviet citizens. Thus, "peoples" of nations that treat everyone equally badly would have no right, while "peoples" treated quite well would be entitled to secede if they were not accorded quite as many rights as the most privileged of that populace.

Moreover, this theoretical basis for determining entitlement to self-determination, while coherent, and also rather congruent with prevailing state conduct, is hard to apply in practice. Once a secessionist movement is in full operation, its ethnic group is almost certain to encounter discriminatory treatment, as is demonstrated by the rise of anti-Tamil sentiment in Sri Lanka in tandem with the spread of Tamil insurrection. Secessionism and discrimination mutually reinforce one another, and it is difficult in particular instances to determine whether secessionism *caused* or *was caused by* unequal treatment.

Difficult or not, the search for a coherent general principle of coverage, or boundary, is important. If it fails, the once-dynamic right of self-determination will fall into incoherence and desuetude. As a rule of state conduct, it began to lose its power to obligate when it became a checkerboard of incoherent practice.

Coherence, in this sense, is fundamental to understanding why a rule text has sufficient legitimacy to affect the conduct of states. The power of coherence to validate derives from the phenomenon we have already identified: that the status of states is symbolically validated by admission into the community of states. It is by symbolic recognition of their membership in that community that states are confirmed in their equal capacity for rights and obligations. Coherence derives from—is the operational manifestation of—that community of rules. Dworkin, although focusing on a community of persons rather than of nations, explains *why* legitimacy is "grounded in" coherence.¹⁸⁵ Coherence demonstrates that states relate through more than random interactions; that they consciously accept responsibilities derived "from a more general responsibility" that is based on membership in a community. Thus, in the community of nations, each state must "treat discrete obligations that arise only under special circumstances, like the obligation to help a friend who is in great financial need, as derivative from and expressing a more general responsibility active throughout the association in different ways."¹⁸⁶ This concern, in principle, must be "an equal

¹⁸⁴ E. BEHR, *THE ALGERIAN PROBLEM* 38 (1961).

¹⁸⁵ R. DWORKIN, *supra* note 7, at 194.

¹⁸⁶ *Id.* at 200.

concern for all members."¹⁸⁷ However, the concern is not incompatible with distinctions, so long as each distinction "fits a plausible conception of equal concern."¹⁸⁸ A plausible conception of equal concern is another way of describing a generalizable principle for determining the coverage of a rule-based obligation.

To take another example of such a search: the UN Charter, in Article 2, sets forth "the principle of the sovereign equality of all . . . Members." Article 27, however, provides that the five permanent members of the Security Council—Britain, China, France, the United States and the USSR—shall have a veto over substantive decisions. If states did not regard the United Nations as an aspect of a global community, this seeming contradiction would not matter. Life is full of contradiction. It only matters when a contradiction rises to the level of an incoherence that invalidates and illegitimizes an aspect of the system of rules of a community to which the state belongs and by reference to which the state defines *its own legitimacy*. Does the contradiction between the voting procedure of the Charter and its rule of state equality invalidate the rules, the UN-based community and, thus, even the individual legitimacy of the members? To ask the question is to understand why states are reluctant to let the Charter fall into incoherence. Instead, they strive to find a reconciling "neutral principle,"¹⁸⁹ a rational distinction that could restore coherence and validate the "checkerboarding." The best one available is this: while all states are equal, some states, because of their special wealth and power, have greater obligations and responsibilities. Consequently, they may also be entitled to an enhanced vote in certain matters.

Unfortunately, this coherent conceptual justification for the privileges granted the "Big Five" in 1945 is not rationally defensible in 1988. In 1945, they really were the world's major powers, having vanquished the Axis and inherited the postwar leadership. Their special status had a certain plausibility, since the success of any important Security Council action would depend on their cooperation. Today, however, Britain, France and China are middle powers, and their role in the world and in the Organization has become no more important than that of some important states without the veto such as the Federal Republic of Germany, Brazil, Nigeria, India and Japan. The privilege bestowed by the rules has thus lost its rational persuasiveness as a boundary, a standard for making distinctions that connects with a rational general principle.

Apparently, this problem of incoherence, with its concomitant dangers, is recognized. While it has not been possible to amend the Charter, Britain, France and China, although casting occasional negative votes in the Council, have made it a practice not to do so except in the company of a majority, or of either the United States or the USSR.¹⁹⁰ In this way, they have contributed to the de facto remission of their veto power.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 201.

¹⁸⁹ For a noteworthy attempt to establish a theoretical basis for such a quest in another area of law, see Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

¹⁹⁰ U.S. Mission to the United Nations, List of Vetoes Cast in Public Meetings of the Security Council (Apr. 14, 1988). Only once did the People's Republic of China stand alone in its veto in

This example illustrated that coherence mandates a connectedness between various component parts of a rule or code; between several applications of a rule in various instances; and between the general principles underlying a rule's application and those implicated in other rules. The General Agreement on Tariffs and Trade of 1947¹⁹¹ further illustrates these aspects of coherence. Its most basic provision is the most-favored-nation clause, which prohibits members from giving benefits to some trading partners not given to all.¹⁹² As long as this rule is applied consistently in practice, it appears to be coherent and, thus, legitimate. In recent years, however, it has become evident that the MFN provision, if applied consistently to all nations, would undermine rather than advance GATT's underlying purpose by diminishing the trade prospects of some 50 less-developed member countries. GATT therefore adopted a Generalized System of Preferences for these special cases.¹⁹³ It allows developed states temporarily to permit preferential access to products of only some states, particularly the "least developed."¹⁹⁴ While GSP is inconsistent with MFN, it coheres with the underlying purpose of GATT, which is to increase trade for all nations. It thus advances the real objectives of GATT. Also, it establishes a standard for distinction between the members to whom MFN is applicable and those temporarily benefited by GSP. That standard connects coherently with boundaries commonly used in other sets of regulations to demarcate coverage. Redistributive principles such as those which underlie GSP are commonplace in the international rule system and justify distinctions that, although creating superficial inconsistencies within rules and the application of rule systems, nonetheless leave the rules coherent and legitimate. The checkerboarding, in other words, is redeemed by being seen as based on a principle that both is consistent with the real intent of the specific rule and connects with that skein of principles integrating various other rules of the international system.

To summarize: coherence, and thus legitimacy, must be understood in part as defined by factors derived from a notion of community. Rules become coherent when they are applied so as to preclude capricious checkerboarding. They preclude caprice when they are applied consistently or, if inconsistently applied, when they make distinctions based on underlying general principles that connect with an ascertainable purpose of the rules and with similar distinctions made throughout the rule system. The result-

the Security Council. *Id.* at 9. France has vetoed alone only twice since 1946. *Id.* at 10-11. All United Kingdom vetoes during the last 15 years have been cast with the United States. *Id.* at 12-13.

¹⁹¹ General Agreement on Tariffs and Trade [hereinafter GATT], Oct. 30, 1947, 61 Stat. (5), (6), TIAS No. 1700, 55-61 UNTS.

¹⁹² *Id.*, Art. 1(1).

¹⁹³ GATT Contracting Parties, Decision of Nov. 28, 1979, Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries, GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 26th Supp. 203 (1980). See also J. JACKSON & W. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 1149 (2d ed. 1986).

¹⁹⁴ Decision of Nov. 28, 1979, *supra* note 193, paras. 1 and 6.

ant skein of underlying principles is an aspect of community, which, in turn, confirms the status of the states that constitute the community. Validated membership in the community accords equal capacity for rights and obligations derived from its legitimate rule system.

By focusing on the connections between specific rules and general underlying principles, we have emphasized the horizontal aspect of our central notion of a community of legitimate rules. However, there are vertical aspects of this community that have even more significant impact on the legitimacy of rules.

V. ADHERENCE (TO A NORMATIVE HIERARCHY) AND COMMUNITY

Professor Hart's observation, noted above, that the international arena lacks a "legislature, courts with compulsory jurisdiction, and centrally organized sanctions" leads him to deduce "that the rules for states resemble that simple form of social structure, consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system."¹⁹⁵ Although he acknowledges that international law does have many substantive "primary" rules, such as those specific rights and duties typically enumerated in treaties or developed through customary usage, he nevertheless concludes that the system is primitive, if not illusory, because it lacks those crucial procedural "secondary" rules which permit a rule to change and adapt through legislation and the decision of courts. An even more serious disqualification of the international system, Hart alleges, is its lack of "a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules."¹⁹⁶ By a "unifying rule of recognition," Hart means an international equivalent of the U.S. Constitution, or the British rule of parliamentary supremacy, both of which are "ultimate" in that they test the validity of all other rules by standards that are not themselves subject to being tested by reference to any superior rule.

Hart identifies the essential elements of a developed system of rules and then concludes that they are missing at the international level. He thus finds the international community to be the approximate equivalent of a small primitive tribe that has primary rules of obligation about such matters as land and kinship, but no system of governance that allocates and regulates social roles or facilitates, by an established process, the making, changing, application and reinterpreting of these random substantive primary rules.

In effect, Hart considers the international system to be primitive because individual rules lack *adherence* to a rule hierarchy. This is a much more sophisticated critique of the international rule system than the simple Austinian one, which focuses on the absence of a system of coercion. Hart does note the lack of institutionalized coercion but puts greater critical emphasis on the failure of international rules to adhere to a hierarchic rule structure.

¹⁹⁵ H. L. A. HART, *supra* note 3, at 209.

¹⁹⁶ *Id.*

Adherence—a term Hart does not use—is used here to mean the vertical nexus between a single *primary rule of obligation* (“cross on the green; stop on the red”) and a pyramid of secondary rules about how rules are made, interpreted and applied: rules, in other words, about rules. These may be labeled *secondary rules of process*. Primary rules of obligation that lack adherence to a system of secondary rules of process are mere ad hoc reciprocal arrangements. They are not necessarily incapable of obligating parties that have agreed to them. They may even connect coherently with the underlying principles of distinction found in other rules to create a horizontal skein that is an aspect of community. But the degree of legitimacy of primary rules that only cohere is less than if the same rule were also connected to a pyramid of secondary rules of process, culminating in an ultimate rule of recognition. A rule, in summary, is more likely to obligate if it is made within the procedural and institutional framework of an organized community than if it is strictly an ad hoc agreement between parties in the state of nature. The same rule is still more likely to obligate if it is made within the hierarchically structured procedural and constitutional framework of a sophisticated community rather than in a primitive community lacking such secondary rules about rules.

Hart’s critique of the community of states as small and primitive is still widely accepted. Even those who think that the system is at a more sophisticated stage of development might well concede that Hart’s misgivings are not wholly unjustified. The recurrence of wars, other conflicts and unremedied injustices invites the appellation “primitive.”

The misgivings, however, need to be kept in perspective. Of course, there *are* lawmaking institutions in the system. One has but to visit a highly structured multinational negotiation such as the decade-long Law of the Sea Conference of the 1970s to see a kind of incipient legislature at work. The Security Council, the decision-making bodies of the World Bank and, perhaps, the UN General Assembly also somewhat resemble the cabinets and legislatures of national governments, even if they are not so highly disciplined and empowered as the British Parliament, the French National Assembly or even the U.S. Congress. Moreover, there *are* courts in the international system: not only the International Court of Justice, the European Community Court and the regional human rights tribunals, but also a very active network of quasi-judicial committees and commissions, as well as arbitral tribunals established under such auspices as the Algiers agreement ending the Iran hostage crisis.¹⁹⁷ Arbitrators regularly settle investment disputes under the auspices and procedures of the World Bank and the International Chamber of Commerce. Treaties and contracts create jurisdiction for these tribunals and establish rules of evidence and procedure.¹⁹⁸

¹⁹⁷ See Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, DEP’T ST. BULL., No. 2047, February 1981, at 3, reprinted in 75 AJIL 422 (1981), 20 ILM 230 (1981).

¹⁹⁸ The World Bank approved the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 UST 1270, TIAS No. 6090,

The international system thus appears on close examination to be a more developed community than critics sometimes allege. It has an extensive network of horizontally coherent rules, rule-making institutions, and judicial and quasi-judicial bodies to apply the rules impartially. Many of the rules are sufficiently determinate for states to know what is required for compliance and most states obey them most of the time. Those that do not, tend to feel guilty and to lie about their conduct rather than defy the rules openly. The system also has means for changing, adapting and repealing rules.

Most nations, most of the time, are both rule conscious and rule abiding. Why this is so, rather than that it is so, is also relevant to an understanding of the degree to which an international community has developed in practice. This silent majority's sense of obligation derives primarily not from explicit consent to specific treaties or custom, but from *status*. Obligation is perceived to be owed to a community of states as a necessary reciprocal incident of membership in the community. Moreover, that community is defined by secondary rules of process as well as by primary rules of obligation: states perceive themselves to be participants in a structured process of continual interaction that is governed by secondary rules of process (sometimes called rules of recognition), of which the UN Charter is but the most obvious example. The Charter is a set of rules, but it is also about how rules are to be made by the various institutions established by the Charter and by the subsidiaries those institutions have created, such as the International Law and Human Rights Commissions.

In addition, obligation is owed not only to the rules of the game, but also to the game itself. This is symptomatic of a community organized by a pyramid of secondary rules at whose apex is an ultimate rule or set of rules of recognition. The ultimate rule defines the community. If the game were football, the ultimate rule of recognition would be the one justifying the statement that what is being played is not baseball or tennis, but football. Thus, when the umpire calls a "foul," the legitimacy of that judgment derives ultimately from those rules which define the activity as football rather than some other sport. In the international system, the game of nations does have its own ultimate, defining set of rules by which the validity of all subsidiary rules—secondary procedural as well as primary substantive—may be tested.

A community is sophisticated when it has such an *ultimate rule of recognition*. In the United States, France, Germany and many other countries this is in the form of a written constitution. In the United Kingdom, however, the existence of an ultimate rule of recognition must be established deductively, since there is no written law defining the community. Nevertheless, it is

575 UNTS 159, which established the International Centre for Settlement of Investment Disputes. See Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 COLUM. J. TRANSNAT'L L. 263 (1966). For U.S. implementing legislation, see Convention on the Settlement of Investment Disputes Act of 1966, Pub. L. No. 89-532, §2, 80 Stat. 344 (codified at 22 U.S.C. §§1650, 1650a (1982)). Under certain circumstances, parties to a dispute may arbitrate in the International Chamber of Commerce Court of Arbitration.

demonstrable that parliamentary supremacy qualifies as an ultimate rule of recognition because it owes its legitimacy only to public acquiescence, or to the corporate act of social commitment sometimes metaphorically described as a social contract. Its validity, unlike all the community's other secondary and primary rules, cannot be tested by reference to any other law. No statute makes Parliament supreme, nor can any law curb that supremacy. Indeed, if an act stipulated that it could only be repealed by a two-thirds majority, Parliament could delete that two-thirds requirement by a simple majority vote.¹⁹⁹ The rule of parliamentary supremacy defines the legitimacy of all other laws, but its own legitimacy is undefined, and thus *ultimate*. The rule is autochthonous: one "sprung from the earth itself."

Both the British Parliament and the U.S. Constitution are repositories of ultimate power unfettered by superior authority. Both the rule of parliamentary supremacy in Britain and the rules embodied in the Constitution of the United States are ultimate secondary rules of process by which the legitimacy of all primary rules of obligation may be tested and established. A rule of ultimate recognition operates with such extraordinary power to validate a subsidiary pyramid of rules—both other secondary rules of a procedural nature and primary rules of obligation—because the ultimate rule is accepted by a community that is defined by that rule. The ultimate set of rules also defines the status of each member of the community; that is to say, each member's status derives from the recognition of membership. Rejection of the ultimate rule by the members constitutes revolution and is the only option for discarding the ultimate rule (which, in some states but not in others, may be changed—as distinct from being overthrown—but only in strict accordance with its own terms). Acquiescence, on the other hand, is demonstrated tautologically, by compliance. Ultimate rules of recognition cannot be validated by reference to any other rule. All other secondary rules of the community are inferior to, and validated by, the ultimate rule or set of rules.

It is the nature of community, therefore, both to empower authority and to circumscribe it by an ultimate rule or set of rules of recognition that exists above, and itself is not circumscribed by, the system of normative authority. Does such a notion of community exist internationally, among states? Do nations recognize an ultimate rule or set of rules of recognition or process by which the legitimacy of all other international rules and procedures can be tested, a rule not itself subject to a higher normative test of its legitimacy, a rule that simply *is*, because it is accepted as font of the community's collective self-definition?

If the international community were merely a playing field on which states engaged in various random, or opportunistic, exchanges or interac-

¹⁹⁹ In perhaps the most eloquent statement of Parliament's unlimited legislative authority, Sir Edward Coke has declared that its "power and jurisdiction . . . is so transcendent and absolute, that it . . . hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws." E. COKE, *FOURTH INSTITUTE* 36, quoted in A. DICEY, *INTRODUCTION TO THE STUDY OF THE CONSTITUTION* 41 (9th ed. 1939).

tions, it would be easy to conclude that this was a truly primitive aggregation, a rabble, lacking the organizing structure of secondary rules of process and, of course, an ultimate secondary rule. This, rather than any absence of coercive force, would indeed justify the appellation "primitive." The international community, however, demonstrably is not like that. States—whatever their occasional rhetorical excesses—recognize that they are not sovereign. They accept that they are members of a sophisticated community with secondary rules and with what amounts to a constitution or ultimate rules of recognition. States also recognize that they derive validation from membership in this community.

The nonsovereignty of states and the existence of a set of ultimate community rules can be demonstrated by examining the way treaties operate from the perspective of those that become parties to them. It is quite wrong to think that treaties bind states *because* they have consented to them. If states were sovereign, the mere act of entering into a treaty could not "bind" them in any accurate sense. States are not bound only because they agree to be bound, in the sense in which neighbors in an apartment building might informally agree, for their mutual convenience, to turn off their television sets by 10 o'clock every evening. Those neighbors are at liberty to disregard their obligation whenever it does not suit their purpose. Nor are states obligated by treaties the way individuals are bound by a contract. In municipal law, contracts are binding because their sanctity is prescribed and enforced by the state.²⁰⁰ True, most contracts operate without recourse to state sanctions, but the sanctions remain in reserve.

Treaties thus do not exactly fit either model. They are not like the free-will agreement among neighbors, which is valid only as long as it continues to suit everyone's purpose; and they are not contracts made under the authority of a sovereign and enforceable by the full authority of the state, through either compelled specific performance or an award of damages. Treaties obviously cannot be binding in the sense of being sanctioned by an Austinian sovereign; but a treaty also cannot be said to be binding only because two or more sovereign states voluntarily agree to carry it out. "Sovereign" means *unboundable*. A treaty ratified by a truly sovereign state could only *declare*, never *bind*, that state's free will. If the state were indeed sovereign, then, no matter what it had signed, it would nevertheless remain free to terminate its consent at any time, just as the sovereign British Parliament cannot legislate a law that can only be amended by a two-thirds major-

²⁰⁰ While the term "contract" is susceptible of many definitions, whatever else a contract may entail, it is agreed that it is "a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." 1 WILLISTON ON CONTRACTS §1 (3d ed. 1957); RESTATEMENT (SECOND) OF CONTRACTS §1 (1981). See also 1 A. CORBIN, CONTRACTS §3 (1963) (which defines a contract to include "a promise enforceable at law directly or indirectly"). In some jurisdictions, courts will routinely mandate specific performance of the promise. See, e.g., Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495 (1959). The Anglo-American legal system, however, prefers to impose damages at least equal to the value of the breached promise. See, e.g., J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 580-604 (1977).

ity. If states were sovereign, entering into a treaty would be nothing more than evidence of their state of mind for the time being.

Notably, states never claim this. They act, instead, as if they were bound. They believe themselves to be bound—which can only be understood as evidence of their acquiescence in something demonstrable only circumstantially: an ultimate rule of recognition. In the international community “sovereignty”—however fragile—resides in the rule, and not in the individual states of the community. States seem to be aware of this rule’s autochthony. They act in professed compliance with, and reliance on, the notion that when a state signs and ratifies an accord with one or more other states, then it has an obligation, superior to its sovereign will. The obligation derives not from consent to the treaty, or its text, but from membership in a community that endows the parties to the agreement with status, including the capacity to enter into treaties.

The most recent instance of this perception of an international rule superior to the specific acquiescence of any particular state is to be found in the advisory opinion rendered by the International Court of Justice on April 26, 1988, at the request of the United Nations General Assembly.²⁰¹ At issue was a conflict between provisions of a U.S. law that required the closing of the Observer Mission of the Palestine Liberation Organization,²⁰² and the obligation assumed under the UN Headquarters Agreement.²⁰³ The Court stated unequivocally that it was “the fundamental principle of international law that it prevails over domestic law,”²⁰⁴ that “the provisions of municipal law cannot prevail over those of a treaty.”²⁰⁵ The U.S. judge (Stephen M. Schwebel) added that “a State cannot avoid its international responsibility by the enactment of domestic legislation which conflicts with its international obligations” under a treaty.²⁰⁶ Unanimously, the Court accepted that clear limitation on the sovereignty of states imposed by membership in the international community.

In Hart’s words, the “view that a state may impose obligations on itself by promise, agreement, or treaty is not . . . consistent with the theory that states are subject only to rules which they have thus imposed on them-

²⁰¹ GA Res. 42/229B (Mar. 2, 1988).

²⁰² The Observer Mission status was created by GA Res. 3237, 29 UN GAOR Supp. (No. 31) at 4, UN Doc. A/9631 (1974). The closure of the mission is required by the Anti-Terrorism Act of 1987, title X of the Foreign Relations Authorization Act, 1988 and 1989, Pub. L. No. 100-204, tit. X, §1001, 101 Stat. 1331, 1406 (codified at 22 U.S.C.A. §§5201-5203 (West Supp. 1988)).

²⁰³ See Agreement Regarding the Headquarters of the United Nations, June 26, 1947, *supra* note 115.

²⁰⁴ Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 ICJ REP. 12, 34, para. 57 (Advisory Opinion of Apr. 26).

²⁰⁵ Greco-Bulgarian “Communities,” 1930 PCIJ (ser. B) No. 17, at 32 (Advisory Opinion of July 31).

²⁰⁶ 1988 ICJ REP. at 42 (Schwebel, J., sep. op.).

selves."²⁰⁷ Rather, "rules must already exist providing that a state is bound to do whatever it undertakes by appropriate words to do."²⁰⁸ This hypothetical notion itself is actually set out in the text of a global treaty defining the law of treaties,²⁰⁹ a document establishing a body of secondary rules of process. Even so, the binding force of the treaty codifying the law of treaties cannot emanate from the agreement of the large majority of states that have ratified it. It must come from some ultimate, generally accepted unwritten rule of recognition that is fundamental to any real understanding of the nature of international obligation.

If there is an ultimate set of secondary rules of process that embodies an abstract sovereignty and confers legitimacy in the international community, what are its other provisions? As with the foregoing rule, *pacta sunt servanda*, the other components of an ultimate rule of recognition can only be hypothesized and demonstrated circumstantially by habitual state deference. Thus, the rule that treaties are binding is itself modified by the rule that treaties are *void ab initio* if they are against the community's basic public policy, that is, if they violate the community's ultimate (peremptory) norms.²¹⁰ A treaty to commit genocide, for example, would be invalid for this reason. A related notion that appears to qualify as part of the ultimate rule of recognition pertains to the binding obligation imposed on state conduct by global custom. There is widespread acknowledgment by states that they are obligated by international customary rules, whether or not they agree in any specific instance with the import of a rule. This was recently reiterated by the International Court of Justice in the case brought by Nicaragua against the United States, where the latter was held to be obligated by an extensive array of customary norms despite an evident desire to pursue its self-interest in a manner incongruent with those rules.²¹¹

There are other parts of the ultimate rule that can be deduced from the practice of states in adhering to it *as an incident of statehood* rather than as a consequence of their specific consent. For example, new states are deemed to acquire the universal rights and duties of statehood not because they have agreed but because they have joined the community.²¹² Similarly, new states may "inherit" rights and duties from a "parent" state²¹³ not by virtue of

²⁰⁷ H. L. A. HART, *supra* note 3, at 219.

²⁰⁸ *Id.*

²⁰⁹ Vienna Convention on the Law of Treaties, *supra* note 33, Art. 26.

²¹⁰ *Id.*, Art. 53.

²¹¹ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

²¹² It is a well-established principle that a new state to the international community is automatically bound by the rules of international conduct existing at the time of admittance. See I. L. OPPENHEIM, *supra* note 77, at 17-18. Even Tunkin concedes that if it enters "without reservations into official relations with other states," a new state is bound by "principles and norms of existing international law." See Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law*, 49 CAL. L. REV. 419, 428 (1961).

²¹³ There has been wide debate over the rights and obligations a successor state can inherit from its parent. The 19th-century doctrine of universal succession maintains that all the rights and duties of the parent pass to the successor. See O. UDOKANG, SUCCESSION OF NEW STATES

their consent but as a concomitant of status. Successor governments, too, automatically inherit rights and obligations.²¹⁴

One more example of a part of the ultimate rule of recognition is the previously noted notion of state equality. UN Charter Article 2(1) specifically restates this rule, and no state since Hitler's Germany has claimed anything to the contrary. All states are bound by a rule of state equality as a concomitant of their membership in the community of nations. In the words of U.S. Chief Justice John Marshall in an 1825 decision, *The Antelope*, "No principle of general law is more universally acknowledged than the perfect equality of nations."²¹⁵

It is therefore circumstantially demonstrable that there are obligations that states acknowledge to be necessary incidents of community membership. These are not perceived to obligate because they have been accepted by the individual state but, rather, are rules in which states acquiesce as part of their own validation; that is, as an inseparable aspect of "joining" a community of states that is defined by its ultimate secondary rules of process. It is even possible to conclude that the members of the global community acknowledge—for example, each time they sign a treaty or recognize a new government—that *statehood is incompatible with sovereignty*. They acknowledge this because they must, so as to obtain and retain the advantages of belonging to an organized, sophisticated community, advantages only available if ultimate sovereignty resides in a set of rules of universal application. That is why states behave as if such rules existed and obligated.

To put the matter another way, a "community" of states exists. It has at least some important secondary rules of recognition. These rules are "associative obligations," to use Dworkin's term,²¹⁶ which fasten onto all states because of their status as validated members of the international community. Only by stretching the notion of "consent" beyond its natural limits can these specific associative obligations be said to have been assumed consensually, even though they may sometimes be restated in a treaty. Dworkin rightly points out that "associative" rules of obligation are interpretive,²¹⁷ defining what a member owes others in the community in general. Thus, the obligation to honor treaties is acquired associatively, rather than by specific consent; and it is owed generally towards all members of the community. This is universally acknowledged. It is inconceivable, for example,

TO INTERNATIONAL TREATIES 122-24 (1972). At the other extreme is negativist theory, which holds that a successor inherits no rights and obligations, but begins with a tabula rasa. See D. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 14-17 (1967). The truth lies somewhere in between, with certain rights and duties of the parent devolving upon the successor. See 1 L. OPPENHEIM, *supra* note 77, at 120. Hart further points to evidence that changes in a state's circumstance may automatically accord it new rights and duties, for example, when it acquires new territory giving it a coastline. H. L. A. HART, *supra* note 3, at 221.

²¹⁴ Tinoco Case (Gr. Brit. v. Costa Rica), 1 R. Int'l Arb. Awards 369 (1923), *reprinted in* 18 AJIL 147 (1924).

²¹⁵ *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825).

²¹⁶ R. DWORKIN, *supra* note 7, at 196.

²¹⁷ *Id.* at 197.

that a state would announce that it would no longer be bound by treaties or custom. The obligation, moreover, cannot be extinguished by renouncing a consent that was never given, but only by extinguishing the status that is the real basis of the obligation.

According to Dworkin, a true community, as distinguished from a mere rabble, or even a system of random primary rules of obligation, is one in which the members

accept that they are governed by common principles, not just by rules hammered out in political compromise. . . . Members of a society of principle accept that their political rights and duties are not exhausted by the particular decisions their political institutions have reached, but depend, more generally, on the scheme of principles those decisions presuppose and endorse. So each member accepts that others have rights and that he has duties flowing from that scheme

Nor are these rights and duties "conditional on his wholehearted approval of that scheme; these obligations arise from the historical fact that his community has adopted that scheme, . . . not the assumption that he would have chosen it were the choice entirely his."²¹⁸

Moreover, the community "commands that no one be left out, that we are all in politics together for better or worse."²¹⁹ And its legitimizing requirement of rule integrity "assumes that each person is as worthy as any other, that each must be treated with equal concern according to some coherent conception of what that means."²²⁰

Does that accurately describe the social condition of the nations of the world in their interactive mode? The description does not assume harmony or an absence of strife. According to Dworkin, an "association of principle is not automatically a just community; its conception of equal concern may be defective."²²¹ What a rule community, a community of principle, does is to validate behavior in accordance with rules and applications of rules that confirm principled coherence and adherence, rather than acknowledging only the power of power. A rule community operates in conformity not only with primary rules but also with secondary ones—rules about rules—which are generated by valid legislative and adjudicative institutions. Finally, a community accepts its ultimate secondary rules of recognition not consensually, but as an inherent concomitant of membership status.

In the world of nations, each of these described conditions of a sophisticated community is observable today, even though imperfectly. This does not mean that its rules will never be disobeyed. It does mean, however, that it is usually possible to distinguish rule compliance from rule violation, and a valid rule or ruling from an invalid one. It also means that it is not necessary to await the millennium of Austinian-type world government to proceed with constructing—perfecting—a system of rules and institutions that will exhibit a powerful pull to compliance and a self-enforcing degree of legitimacy.

²¹⁸ *Id.* at 211.

²²⁰ *Id.* at 214.

²¹⁹ *Id.* at 213.

²²¹ *Id.*

SELF-EXECUTING TREATIES

By Jordan J. Paust*

The distinction found in certain cases between "self-executing" and "non-self-executing" treaties is a judicially invented notion that is patently inconsistent with express language in the Constitution affirming that "*all* Treaties . . . shall be the supreme Law of the Land."¹ Indeed, such a distinction may involve the most glaring of attempts to deviate from the specific text of the Constitution. For some 40 years after the formation of the Constitution, President George Washington's recognition in 1796 that "*every* Treaty [properly ratified] . . . thenceforward becomes the law of the land" was widely shared.² Yet today not all treaties are thought to be capable of operating as supreme federal law of their own effect.

It may prove profoundly informative to rediscover the predominant expectations of the Framers concerning the domestic legal effects of treaties and to ask whether certain present distinctions make constitutional sense. To that end, this paper will examine the following questions: When did the judicially created distinction first occur? How has it actually been used in the Supreme Court's history? Should the distinction be retained? What sort of criteria have been articulated with respect to the difference between a "self-executing" and a "non-self-executing" treaty, and how do these relate to the views of the Framers and to our constitutional history? Although a treaty may be non-self-executing according to its own terms, should any other treaty be inherently non-self-executing? What are the implications regarding a proper separation of powers and a responsible judiciary?

"ORIGINAL INTENT"—PREDOMINANT VIEWS OF THE FRAMERS

The year before the Constitutional Convention, on October 13, 1786, John Jay, as Secretary of Foreign Affairs of the Confederation, reported to Congress that a treaty "made, ratified and published by Congress, . . . immediately [became] binding on the whole nation, and superadded to the laws of the land. . . . Hence [it was to be] . . . received and observed by every member of the nation"³ By unanimously adopting Jay's his-

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¹ See U.S. CONST. art. VI, cl. 2 (emphasis added). See also *id.* art. III, §2, cl. 1 ("The judicial Power shall extend to *all* Cases . . . arising under . . . Treaties . . .") (emphasis added).

² See President Washington, Message to the House of Representatives, Mar. 30, 1796, reprinted in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 371 (M. Farrand ed. 1937) (emphasis added). The President added: "when ratified, [*all*] treaties] become obligatory. . . . [T]he assent of the House of Representatives is not necessary." *Id.* See also note 29 *infra*.

³ Jay, report to Congress, Oct. 13, 1786, quoted in 1 C. BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES 268 n.4, 270 (1902). Jay also made these points after becoming Chief Justice in 1789. See notes 36-37 *infra*.

toric report,⁴ Congress affirmed this early expectation that all treaties would be self-executing and superadded immediately to the laws of the land.

Jay's report also reflected the expectation that treaties would be national acts creating a supreme law of the land "independent of the will and power of" state legislatures⁵ and that they were to be applied in all courts hearing causes or questions arising from or touching on such law.⁶ With respect to the concept of national preemption, now termed federal preemption, Jay added: "the legislatures of the several states cannot of right pass any act or acts for interpreting, explaining or construing a national treaty, or any part or clause of it; nor for restraining, limiting or counteracting the operation or execution of the same."⁷ Yet, as noted above, judicial power certainly applied, and "[a]ll doubts, in cases between private individuals, respecting the meaning of a treaty, like all doubts respecting the meaning of a law," were to be resolved by the judiciary.⁸

Soon afterward, Jay's report was referred to by Judge James Iredell of North Carolina (who later joined the U.S. Supreme Court), Iredell recognizing, much like the Secretary, "that a treaty when once made pursuant to the sovereign authority, *ex vi termini* became immediately the law of the land" and was "binding upon those who delegated authority for that purpose," i.e., the people.⁹ Indeed, recommendations during the 1787 Convention that treaties be ratified or sanctioned by congressional legislation, since they "are to have the operation of laws," were defeated.¹⁰ Draft phrases such as "enforce treaties" were also considered "superfluous, since treaties were to be 'laws' " and thus were directly enforceable.¹¹ A proposal by James Madison that there be two types of treaties (i.e., those requiring only action by the Senate and the President, and those also requiring House action before they could take effect as law) was also rejected¹²—further

⁴ 1 C. BUTLER, *supra* note 3, at 389. Nearly the same phrases as those quoted in the text at note 3 *supra* and at notes 5–7 *infra* were adopted in a resolution of the Continental Congress of Mar. 21, 1787. 12 J. CONG. 24 (1801).

⁵ See 1 C. BUTLER, *supra* note 3, at 274 n.4. See also note 13 *infra*. Similarly, Jay wrote: "Under the national government, *treaties* and articles of treaties . . . will *always* be *expounded* . . . and *executed* . . ." THE FEDERALIST NO. 3, at 98 (B. Wright ed. 1961) (emphasis added).

⁶ See 1 C. BUTLER, *supra* note 3, at 270 n.4 and 275 n.4. See also *Hamilton v. Eaton*, 11 F. Cas. 336, 337 (Sitgreaves), 340 (Ellsworth) (C.C.D.N.C. 1792) (No. 5,980). Oliver Ellsworth had been a member of the Constitutional Convention (1787) and would join the Supreme Court in 1796. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 1109 (3d ed. 1986).

⁷ See 1 C. BUTLER, *supra* note 3, at 274 n.4.

⁸ See *id.* at 270 n.4.

⁹ See *id.* at 389 (quoting a pamphlet written by Iredell). Iredell would make similar points later (see note 17 *infra*) and after joining the Supreme Court in 1790 (see notes 36, 40 *infra*; cf. note 46 *infra*).

¹⁰ See J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 520 (recommendation of Gouverneur Morris on Aug. 23), 597 (recommendation, quoted in part in the text above, by James Wilson on Sept. 7) (1966 ed.) (1840); 2 Farrand (ed.), *supra* note 2, at 297 (Mercer), 538 (Wilson); see also THE FEDERALIST NO. 64, at 421–24 (Jay).

¹¹ See J. MADISON, *supra* note 10, at 517.

¹² See 2 Farrand (ed.), *supra* note 2, at 394.

evidence that there was to be one type of treaty law, that which is immediately operative as supreme federal law when approved by the Senate and ratified by the President.

That this expectation predominated among the Framers can be seen as well in the *Federalist* papers and in the various debates on ratification of the Constitution in the states. For example, the *Federalist* recognized that "treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations."¹³ A later paper declared that the treaty power "ought to exist without limitation . . . [, with] no constitutional shackles."¹⁴ During the 1788 debates on ratification in North Carolina, Mr. Lenoir affirmed that the treaty power is a "legislative power given to the President" and Senate, since treaties "are to be the supreme law of the land."¹⁵ Iredell, who was supported by a similar remark by Porter,¹⁶ added: "When treaties are made, they become as valid as legislative acts . . . [and] the law of the land."¹⁷ Also in North Carolina, William Davie stated: "It was necessary that treaties should operate as laws on individuals. They ought to be binding upon us the moment they are made. They involve in their nature not only our own rights, but those of foreigners [and should be protected by the federal judiciary]."¹⁸ Treaties, Davie added, "are the supreme law of the land to their respective citizens or subjects."¹⁹

¹³ THE FEDERALIST NO. 22, at 197 (Hamilton). Hamilton asserted also that federal judicial power extends to "cases arising upon treaties and the law of nations," without mentioning any distinction among types of treaties and later quoting Article III, §2, "all cases . . . arising under" (emphasis added). *Id.*, NO. 80, at 501, 503 (Hamilton). See also *id.*, NO. 64, at 423-24 (Jay):

[T]reaties, when made, are to have the force of laws . . . [and] have as much legal validity . . . as if they proceeded from the legislature

. . . They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government.

Jay implicitly added that this power need not involve the full legislature, yet it was a power "by which the citizens are to be bound and affected," and he noted: "It will not be in the power of the President and Senate to make any treaties by which they and their families and estates will not be equally bound and affected with the rest of the community" *Id.* at 424, 425. He articulated these points again as Chief Justice. See notes 36-37 *infra*. On Jay's point that the President is bound, see, e.g., Paust, *The President Is Bound by International Law*, 81 AJIL 377 (1987).

¹⁴ THE FEDERALIST NO. 23, at 200 (Hamilton). The treaty power, of course, is that of the President and Senate.

¹⁵ See 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 27 (J. Elliot ed. 1941) (1830). George Mason of Virginia had opposed the new constitution, in part because the federal treaty power was "in many Cases, an exclusive Power of Legislation." See G. MASON, OBJECTIONS TO THE CONSTITUTION OF GOVERNMENT FORMED BY THE CONVENTION (1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 11 (H. Storing ed. 1981), 2 Farrand (ed.), *supra* note 2, at 639. Similarly, Cato had opposed ratification, characterizing treaties as "legislation." See Letters of Cato, N.Y.J., September 1787-January 1788, reprinted in Storing (ed.), *supra*, at 122.

¹⁶ See 4 Elliot (ed.), *supra* note 15, at 115.

¹⁷ *Id.* at 28.

¹⁸ *Id.* at 158.

¹⁹ *Id.* at 119.

In South Carolina, John Rutledge affirmed that "every treaty was law paramount, and must operate. . . . [T]his treaty is binding in our courts and in England." "Now supposing," he continued, "any [subsequent] law had passed . . . , would not the treaty be a sufficient bar to any local or municipal laws?"²⁰ His colleague Charles Pinckney noted that treaties under the new Constitution were to be "paramount to the laws of the land," would create individual rights and duties, and would have the force of law.²¹ In Pennsylvania, James Wilson affirmed that Article III, section 2 of the new Constitution "will show the world that we make the faith of treaties a constitutional part of the character of the United States; that . . . the judges of the United States will be enabled to carry it into effect."²² "There is no doubt," Wilson added, that "under this Constitution, treaties will become the supreme law of the land [T]reaties are to have the force of laws"²³ Similar points were made by James Madison²⁴ and George Nicholas²⁵ in Virginia. Although some had argued that the consent of the House should be required in the case of "commercial" treaties,²⁶ no such limitation on the treaty power was ultimately proposed or adopted.

After ratification, the predominant expectations of the Framers were reaffirmed by the first President.²⁷ As noted by Mr. Murray that same year (1796) in the House of Representatives while referring to the "explicitness of the instrument itself" (i.e., to the patent command of the text of the Constitution), "nothing . . . is left for expedience or sophistry [A]s a treaty, it is the supreme law of the land . . . nothing that we can rightfully do, or refuse to do, will add or diminish its validity, under the Constitution and law of nations."²⁸ Thus, it could be written in a constitutional law treatise in 1825: "[T]he people of course excluded from all interference with it, those parts of the government which are not described as partaking of it [e.g., the House]. . . . The immediate operation of the treaty must

²⁰ *Id.* at 267-68 (emphasis added). Rutledge was appointed to the Supreme Court in 1789 and had been one of the signers of the Constitution. See J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 6, at 1111.

²¹ See 4 Elliot (ed.), *supra* note 15, at 277-79.

²² 2 *id.* at 490. Wilson, who had signed the Declaration of Independence and the Constitution and would join the Supreme Court in 1789 (see J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 6, at 1112), would make similar points as a Justice. See notes 36-37 *infra*.

²³ 2 Elliot (ed.), *supra* note 15, at 506.

²⁴ See 3 *id.* at 501, 514, 532.

²⁵ See *id.* at 502, 506.

²⁶ See *id.* at 365 (Grayson of Virginia), 511 (Corbin of Virginia).

²⁷ See text at note 2 *supra*. Hamilton, in a draft for the President's message, had written: "the House of Representatives . . . have no legal power to refuse its execution because it is a law." See WORKS OF ALEXANDER HAMILTON 566 (J. C. Hamilton ed. 1851), *quoted in* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 161 (1972). The treaty power was simply too important to be left with the full Congress, or even with Congress and the Executive. See also notes 1, 2, 4, 5 and 13 *supra*, and note 29 *infra*.

²⁸ See 4 Elliot (ed.), *supra* note 15, at 435. But see Gallatin, 4 ANNALS OF CONG. 744-46 (1796). For views similar to Murray's, see, e.g., notes 13-15, 27 *supra*; 4 ANNALS OF CONG. 485 (Havens), 595-96 (J. Smith) and 1243 (Ames), *quoted in* Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1098-99 (1985); see also *id.* (Hamilton, Findley, Williams, Coit).

therefore be to overrule all existing legislative acts inconsistent with its provisions."²⁹

These historic patterns of expectation demonstrate that most of the Framers intended all treaties *immediately* to become binding on the whole nation, superadded to the laws of the land; to be observed by every member of the nation; to be applied by the courts whenever a cause or question arose from or touched on them; and to prevail over and preempt any inconsistent state action. In these ways at least, all treaties (to the extent of their grants, guarantees or obligations) were to be self-executing. Additionally, it would have made no sense to argue that a particular treaty was not self-executing unless one agreed that whether or not a treaty was self-executing was to be tested by the language of the treaty considered in context (with the possible exception posed by some exclusive congressional power expressly documented as such in the new Constitution).

These recaptured views of the Founders are certainly consistent with the actual text of the Constitution and would require acknowledgment, in modern parlance, that all treaties are self-executing except those (or the portions of them) which, by their very terms, require domestic implementing legislation. According to this viewpoint, as the words of the Constitution affirm, each treaty is supreme law of the land, especially for use by the judiciary³⁰ and for supremacy purposes.³¹ Each treaty is law; but if a treaty provision expressly requires domestic implementing legislation before it becomes directly operative, that is merely a condition of such law. Further, as explained below, merely because the full Congress (i.e., the House and Senate) has an express power to make a law should not be relevant to whether a treaty is self-executing, since the President and Senate also have an express power to make treaty law and each treaty is supreme law of the land.

EARLY CASES

The earliest federal cases addressing the domestic effect of treaties made no mention of any distinction between self-executing and non-self-executing treaties. Not surprisingly, the language in early judicial opinions mirrored the predominant expectations of the Framers noted above. In 1792, for example, Judge Oliver Ellsworth, who would join the U.S. Supreme Court 4 years later, wrote that a treaty, "being ratified and made . . . became a complete national act and law of every state."³² Judge Sitgreaves, writing in

²⁹ W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 57-61 (1825), quoted in 1 C. BUTLER, *supra* note 3, at 397; see also 1 J. KENT, COMMENTARIES ON AMERICAN LAW 286-87 (1826) (general expectations that a treaty "is as much obligatory upon Congress as upon any other branch of the government, or upon the people at large. . . . The House of Representatives are not above the law"); letter from Secretary of State Livingston to Mr. Serurier, June 3, 1833, reprinted in 2 F. WHARTON, A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES 67 (1866).

³⁰ See U.S. CONST. art. III, §2, cl. 1; see also text at notes 6, 8, 13, 18, 20 and 22 *supra*.

³¹ See U.S. CONST. art. VI, cl. 2; see also McLaughlin, *The Scope of the Treaty Power in the United States*, 42 MINN. L. REV. 709, 731 (1958) ("the phrasing used was calculated to assure that all treaties were included").

³² *Hamilton v. Eaton*, 11 F. Cas. 336, 340 (C.C.D.N.C. 1792) (No. 5,980).

the same case, declared that "the treaty consequently became obligatory on the people . . . when made and duly ratified," which "was alone sufficient" for its "validity and legality" within the United States with respect to judicial decision making.³³

In 1801 Chief Justice Marshall declared broadly: "If the law [there, a treaty] be constitutional, . . . I know of no court which can contest its obligation."³⁴ And in 1809 the Chief Justice wrote: "*Whenever* a right grows out of, or is protected by, a treaty, . . . it is to be protected."³⁵ In fact, in several federal cases decided up until 1829, treaty law was accepted as operating directly as supreme federal law in the face of inconsistent state law,³⁶ or more generally for other purposes.³⁷ Moreover, it was early recognized that statutes should be interpreted so as to be consistent with international law, a recognition that was not hinged upon whether or not a treaty was self-executing or directly operative.³⁸ And it was recognized, at least since 1796, that federal judges, as state judges under the Supremacy

³³ *Id.* at 337. See also *Penhallow v. Doane's Admin.*, 3 U.S. (3 Dall.) 54, 94 (1795) (Paterson, J.) ("when rightfully exercised," constitutional power as to treaties is "equally binding upon those from whom the authority was derived," i.e., the people).

³⁴ *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.). Just before he joined the Court, Marshall, as a member of the House of Representatives, defended the actions of President Adams under a treaty by noting: "The treaty . . . is a law . . . Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses." 10 ANNALS OF CONG. 613-14 (1800).

³⁵ *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348-49 (1809) (Marshall, C.J.) (emphasis added). As Secretary of State, Marshall had also decried the failure of certain British judges to apply international law, thus "converting themselves from judges into mere instruments of plunder." See 2 AMERICAN STATE PAPERS (FOREIGN RELATIONS) 286-87, 486-90 (1832).

³⁶ See, e.g., *Carneal v. Banks*, 23 U.S. (10 Wheat.) 181, 189 (1825) (Marshall, C.J.); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 271, 274-76 (1817) (Marshall, C.J.); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-41, 360 (Story, J.), 370-71 (Johnson, J.) (1816); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 627 (1813) (Story, J.); *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348-49 (1809) (Marshall, C.J.); *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454, 458 (1806); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-37 ("any treaty"), 244-45 (Chase, J.), 249, 256 (Paterson, J.), 272, 276-77, 279 (Iredell, J.), 281 (Wilson, J.), 282, 284 (Cushing, J.) (1796); *Hamilton v. Eaton*, 11 F. Cas. at 337-38, 340; *Gordon v. Kerr*, 10 F. Cas. 801, 802 (C.C.D. Pa. 1806) (No. 5,611) (Washington, Circuit Justice); *Fisher v. Harnden*, 9 F. Cas. 129, 130-31 (C.C.D.N.Y. 1812) (No. 4,819) (Livingston, Circuit Justice), *aff'd*, 14 U.S. (1 Wheat.) 300 (1816). See also *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794) (Jay, C.J.) (alien's individual right "revived at the peace, both by the law of nations and the treaty of peace").

³⁷ See, e.g., *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542 (1828) (Marshall, C.J., opinion); *United States v. Robins*, 27 F. Cas. 825, 833 (D.C.D.S.C. 1799) (No. 16,175); *United States v. Cooper*, 25 F. Cas. 631, 641-42 (C.C.D. Pa. 1800) (No. 14,865) (Chase, Circuit Justice); *Henfield's Case*, 11 F. Cas. 1099, 1100-01 (Jay, C.J.), 1120 (Wilson, J.) (C.C.D. Pa. 1793) (No. 6,360); 1 Op. Att'y Gen. 57, 58 (1795); see also *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159-61 (1795) (Iredell, J.); 1 Op. Att'y Gen. 566, 570-71 (1822).

³⁸ See, e.g., *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-18 (1804) (Marshall, C.J.); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) (Marshall, C.J.); 1 Op. Att'y Gen. 52, 53 (1794); 1 Op. Att'y Gen. 26, 27 (1792).

Clause,³⁹ are equally "bound by duty and oath" to apply treaty law.⁴⁰ Indeed, in 1809 Chief Justice Marshall affirmed: "The reason for inserting that clause [Art. III, §2, cl. 1] . . . was, that all persons who have real claims under a treaty should have their causes decided . . ."⁴¹

Ever since these cases, the supremacy of international law over state law has been complete and in no Supreme Court decision has that supremacy had to depend upon the status of a treaty as self-executing law.⁴² Of course, nothing in the written Constitution requires that a treaty be self-executing in order to be supreme law of the land. By express terms, "all" treaties made under the authority of the United States "shall" have that status.⁴³ Indeed, it is difficult to imagine that something shall be supreme federal "law of the land" but not operate directly as "law" except by believing in one of the most transparent of judicial delusions. That sort of vision has been applied by the Supreme Court only with regard to competing congressional power (i.e., of the full Congress, including the House), for example, when a constitutionally required power of Congress was thought to be at stake.⁴⁴ It first occurred, moreover, nearly 40 years after the formation of the Constitution, without any evident precedent and in seeming contrast to the predominant expectations of the Framers and early judicial opinions noted above.

THE JUDICIAL INVENTION

The first Supreme Court opinion that actually used the phrase "self-executing" did not appear until 1887.⁴⁵ Yet Chief Justice Marshall had invented the concept in 1829 when opining that a treaty "is carried into

³⁹ See U.S. CONST. art. VI, cl. 2.

⁴⁰ See *Ware v. Hylton*, 3 U.S. (3 Dall.) at 237, 244 (Chase, J.), 261 (Iredell, J.), 272 (*cf. id.* at 273); Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393, 434-35, and references cited (1988).

⁴¹ See *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) at 348-49. Importantly, the Chief Justice declared the next year that our judicial tribunals "are established . . . to decide on human rights." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810) (Marshall, C.J., opinion).

⁴² See Paust, *supra* note 40, at 430, 431-33 n.79, and references cited; see also Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 867 n.65 (1987); *Gordon v. Kerr*, 10 F. Cas. 801, 802 (C.C.D. Pa. 1806) (No. 5,611) (seemingly non-self-executing treaty "is supreme" over state constitution); 6 Op. Att'y Gen. 291, 293 (1854); B. WESTON, R. FALK & A. D'AMATO, *INTERNATIONAL LAW AND WORLD ORDER* 192 (1980); L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 947 (1973); Wright, *National Courts and Human Rights—The Fujii Case*, 45 AJIL 62, 69 (1951); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §115 comment *e* (1987) [hereinafter RESTATEMENT (THIRD)] (stating that any U.S. treaty or international agreement "supersedes inconsistent State law or policy Even a non-self-executing agreement . . . may sometimes be held to be federal policy superseding State law or policy"). *But see id.* ("non-self-executing agreement . . . not effective as law").

⁴³ U.S. CONST. art. VI, cl. 2.

⁴⁴ See Paust, *supra* note 40, at 431-33 n.79, and references cited; notes 99, 104-05 and 107 *infra*.

⁴⁵ *Bartram v. Robertson*, 122 U.S. 116, 120 (1887) (Field, J., opinion). Justice Field used the phrase a year later in a more oft-cited opinion. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (Field, J., opinion).

execution . . . whenever it operates of itself,"⁴⁶ the notion being that some treaties do not operate of themselves but require domestic legislation to carry them "into execution." This judicial invention, considered in historical context and with reference to other words in Marshall's 1829 opinion, was relatively proper. Later commentators, however, have distorted his meaning and created tests concerning self-executing and non-self-executing treaties that are patently inconsistent with the text of the Constitution, the predominant expectations of the Framers and early judicial opinions. What Marshall actually declared and his evident criterion are worth examining.

Marshall knew that in some countries a treaty is "not a legislative act" and "does not generally effect, of itself, the object to be accomplished . . . but is carried into execution by" legislation or other exercises of "sovereign power."⁴⁷ He added, however, that "[i]n the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself . . ."⁴⁸ Therefore, even though Marshall still maintained that every treaty was "the law of the land,"⁴⁹ his suggestion that some treaties did not operate of themselves represented a new twist, perhaps, with respect to precedent—but, in context, a minor new twist. After all, *the* criterion as to whether or not a treaty, as law, was to be "carried into execution" was to be the treaty itself. It was to be carried into execution "*whenever it operates of itself*," and it was not to be self-executory if its terms so indicated.⁵⁰ Thus, it was the language of such supreme federal law, considered in context, that was to be determinative.

⁴⁶ *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.). See also *id.* (treaties that "the legislature must execute").

⁴⁷ *Id.* Marshall had primarily in mind the practice in Great Britain. *Id.* For evidence of a subsequent British practice, see Preuss, 45 ASIL PROC. 82, 85-87 (1951); *United States v. Rauscher*, 119 U.S. 407, 417 (1886).

In fact, most nation-states ratify treaties through a legislative process, thus obviating much of the concern about "self-executing" status or shifting attention to the intent of the legislature upon ratification. Cf. Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627, 638-41 & n.57 (1986). See also RESTATEMENT (THIRD), *supra* note 42, §111 Reporters' Note 5 ("few other states distinguish between self-executing and non-self-executing treaties"); T. FRANCK & M. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 274-75 (1987); Henry, *When Is a Treaty Self-Executing?*, 27 MICH. L. REV. 776, 779 (1929); Lillich, *Invoking International Human Rights in Domestic Courts*, 54 U. CIN. L. REV. 367, 373 (1985); Preuss, *supra*, at 87-96, and references cited; P. DE VISSCHER, DE LA CONCLUSION DES TRAITÉS INTERNATIONAUX 122, *passim* (1943). Professor Iwasawa also explains the many different meanings of "self-executing" and related phrases here and abroad and some of the confusion generated by the use of such phrases. See Iwasawa, *supra*, at 635-49, and references cited.

⁴⁸ 27 U.S. (2 Pet.) at 314.

⁴⁹ See notes 34-38 *supra*. As a member of the House, the year before he joined the Court, Marshall had also recognized that the President was bound by a treaty because it was supreme federal law. See 10 ANNALS OF CONG. 614 (1800), also in *United States v. Robins*, 27 F. Cas. 825, 836, 867 (D.C.D.S.C. 1799) (No. 16,175).

⁵⁰ See 27 U.S. (2 Pet.) at 314 ("when the terms . . .—when either of the parties engages . . . , [when] the treaty addresses"); see also *id.* at 314-15:

Do these words act directly . . . or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?

This viewpoint was relatively consistent with prior patterns of expectation, and it would be expressed later in connection with criteria utilized to test self-executory effect.⁵¹ Again, in this sense, all treaties, to the extent of their grants, guarantees or obligations, were to be self-executing. Those that were not were those which, by their terms, required domestic implementing legislation. Law was to operate as law unless the law itself specified that domestic implementing legislation was necessary to produce direct legal effect. Applying this general test (hereinafter termed the language of the treaty criterion), Marshall found that a specific portion of a treaty between the United States and Spain protecting private land titles (couched in the terms "shall be ratified and confirmed") was not directly operative.⁵² Four years later, however, he reversed himself after construing the terms of the same treaty differently: "*They may import that they 'shall be ratified and confirmed' by force of the instrument itself.*"⁵³ In effect, Marshall had retained

. . . It does not say, that those grants are hereby confirmed. *Had such been its language*, it . . . would have repealed those acts of congress which were repugnant to it; *but its language is*, that those grants shall be ratified and confirmed . . . By whom shall they be ratified and confirmed? [emphasis added].

⁵¹ See, e.g., *Warren v. United States*, 340 U.S. 523, 526-27 (1951); *Valentine v. United States*, 299 U.S. 5, 10-11 (1936); *Jones v. Meehan*, 175 U.S. 1, 10 (1889); *Baldwin v. Franks*, 120 U.S. 578, 703-04 (1887) (Field, J., dissenting); *Edye v. Robertson*, 112 U.S. 580, 598-99 (1884); *Dainese v. Hale*, 91 U.S. 13, 18-19 (1875); *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) at 348-49; *Cardenas v. Smith*, 733 F.2d 909, 918 (D.C. Cir. 1984); *Benjamins v. British European Airways*, 572 F.2d 913, 916-19 (2d Cir. 1978); *Z. & F. Assets Realization Corp. v. Hull*, 114 F.2d 464, 470 (D.C. Cir. 1940), *aff'd*, 311 U.S. 470 (1941); *Ex parte Toscano*, 208 F. 938, 942 (S.D. Cal. 1913); *United Shoe Mach. Co. v. Duplessis Shoe Mach. Co.*, 155 F. 842, 845 (5th Cir. 1907); *United States v. Enger*, 472 F.Supp. 490, 542 & n.23 (D.N.J. 1978); *Noel v. Linea Aeropostal Venezolana*, 144 F.Supp. 359, 360 (S.D.N.Y. 1956); *Indemnity Ins. Co. of N. Am. v. Pan Am. Airways*, 58 F.Supp. 333, 340 (S.D.N.Y. 1944); *Five Per Cent Cases*, 6 Ct. Cust. App. 291, 328-31 (1915), *rev'd on other grounds*, 243 U.S. 97 (1917); see also *Ware v. Hylton*, 3 U.S. (3 Dall.) at 244 (Chase, J.); *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90, 101 (9th Cir.) (Trask, J., concurring), *cert. denied*, 420 U.S. 1003 (1974); *Blandford v. State*, 10 Tex. App. 627, 639-40 (1881); *Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697, 702 (1878); M. S. McDUGAL & W. M. REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 1223 (1981) (*cf. id.* at 1229-30); I N. REDLICH & B. SCHWARTZ, *CONSTITUTIONAL LAW* 3-107 (1983); B. SCHWARTZ, *CONSTITUTIONAL LAW* 102 (2d ed. 1979); 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §423 (1833); 4 *id.* §1838 (4th ed. 1873); J. SWEENEY, C. OLIVER & N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM* 1069 (2d ed. 1981) (*but see id.* at 1076 (Riesenfeld's suggestion)); Bell & Foy, *The President, the Congress, and the Panama Canal: An Essay on the Powers of the Executive and Legislative Branches in the Field of Foreign Affairs*, 16 GA. J. INT'L & COMP. L. Supp. 607, 627, 629 & n.97, 633 (1986); McDougal, *Remarks*, 45 ASIL PROC. 102 (1951); note 94 *infra*; *cf.* Henry, *supra* note 47, at 785, *passim*; Iwasawa, *supra* note 47, at 654-57, and references cited; Shelton, *Overview of International Human Rights Law in Domestic Courts*, 17 U.S.F. L. REV. 12, 16 (1982). See also Henkin, *Lexical or "Political Question": A Response*, 101 HARV. L. REV. 524, 533 (1987) (strong preference "to make treaties self-executing whenever the character of the undertaking permits, so that they will have full status immediately as law").

⁵² See 27 U.S. (2 Pet.) at 314-15; note 50 *supra*.

⁵³ *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833) (Marshall, C.J.) (emphasis added) (adding that the "Spanish part of the treaty was not then [in *Foster*] brought to our view . . . [It shows a] difference of expression in the same instrument, drawn up in the language

and reapplied a language of the treaty test. It was not a "political question" test,⁵⁴ and it was not a test that was hinged upon the existence of some concurrent congressional power.⁵⁵ Thus, under Marshall's test, no particular subject matter would render a treaty inherently non-self-operative.

Interestingly, Marshall cited no precedent for his invented distinction and proffered test, but could he have cited Justice Iredell's dissenting opinion in *Ware v. Hylton*?⁵⁶ Was Iredell arguing in *Ware* that, under the Constitution, certain treaty provisions are inherently "executory" "[w]hen . . . a treaty stipulates for any thing of a legislative nature, [because, in his view,] the manner of giving effect to this stipulation is by that power which possesses the Legislative authority"?⁵⁷ It is extremely doubtful that he was. First, Iredell was addressing a circumstance "independent of" and "previous to the ratification of the present Constitution."⁵⁸ Second, such a notion would have been completely at odds with his statements noted earlier concerning the immediate effect of treaties as supreme federal law under the new Constitution.⁵⁹ Third, he stated that his points about the operation of a treaty prior to the Constitution derived "considerable weight from the practice in Great Britain,"⁶⁰ which, after and with respect to the Constitution, would have been a strange precedential referent indeed.⁶¹ Fourth, Iredell recognized that the very problem before the Court had led to the formation of the Supremacy Clause, which would thereafter control;⁶² but he argued that his notion of "executory" treaty provisions should operate in such a manner that state law would control when something had been "done" or "executed" under state law *prior* to the creation of the Supremacy Clause.⁶³ Fifth, he understood that the distinction between "executed"

of each party"). See also *Garcia v. Lee*, 37 U.S. (12 Pet.) 511, 519 (1838) (Taney, C.J., opinion); *United States v. Wiggins*, 39 U.S. (14 Pet.) 334, 349 (1840) (Catron, J., opinion).

⁵⁴ *Contra* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 630 (1857) (Curtis, J.); Wright, *supra* note 42, at 64. All that Marshall said that was even close was that "when the terms . . . import a contract . . . to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract." 27 U.S. (2 Pet.) at 314 (emphasis added). See also *id.* at 315; notes 50, 53 *supra*. See further text at note 59 *infra*; *Ware v. Hylton*, 3 U.S. (3 Dall.) at 244 (Chase, J.) (stating that an article in a treaty is "a contract, on behalf of those courts"—thus, "contract" language does not require legislative action).

⁵⁵ In *Foster and Percheman*, Congress clearly had enacted relevant legislation under a relevant congressional power, but self-executory effect hinged on interpretation of the terms of the treaty itself. On the general point, see also L. HENKIN, *supra* note 27, at 149, 159 n.††; RESTATEMENT (THIRD), *supra* note 42, §111 Reporters' Note 6; notes 100 and 102 *infra*.

⁵⁶ 3 U.S. (3 Dall.) 199, 256 (1796) (Iredell, J., dissenting).

⁵⁷ See *id.* at 272.

⁵⁸ See *id.* at 271–72.

⁵⁹ See notes 9 and 17 *supra*.

⁶⁰ See 3 U.S. (3 Dall.) at 273 (Iredell, J., dissenting).

⁶¹ See text at notes 47–48 *supra*; see also *Respublica v. Cobbet*, 3 U.S. (3 Dall.) 467, 473 (1798).

⁶² See 3 U.S. (3 Dall.) at 276–77 (Iredell, J., dissenting) (adding: once the Constitution was ratified, the treaty would control "as if every act constituting an impediment . . . had been expressly repealed, and any further act passed, which the public obligation had before required").

⁶³ See *id.* at 277.

and "executory" provisions of a treaty was to be addressed "by considering various stipulations in the treaty" and whether, "from the nature of them, they require no further act to be done."⁶⁴ He did not consider the new powers of Congress in *Ware*, and he acknowledged that provisions of the treaty permitting fishing rights and the right to navigate the Mississippi were thereby "executed" (i.e., because of the words of the treaty and their nature, requiring no further act).

From the above, it is evident that Iredell's scheme, even if it was thought to be applicable after the enunciation of the Supremacy Clause of the new Constitution, involved a situation where a treaty is "executory" according to its own terms—for example, when by its terms it requires domestic implementing acts of legislation. It is then that "a treaty *stipulates for*" a legislative act, and "the manner of giving effect to *this* stipulation" would certainly be "by that power which possesses the Legislative authority."⁶⁵ As Justice Chase affirmed in the same case, "No one can doubt that a treaty may stipulate, that certain acts shall be done by the Legislature"; but he disagreed that the relevant portions of the treaty in question could be so interpreted.⁶⁶ In this sense, Chase and Iredell were using the same test with respect to "executory" treaty provisions, but that test was hinged upon the language of the treaty and did not involve—any more than Marshall's concept some 33 years later in *Foster*⁶⁷—a more recent notion of inherently non-self-executing treaties based on an interpretation of powers conferred by the Constitution.

Before other postulated tests or criteria are addressed, it is worth noting that other writers have rightly recognized that Chief Justice Marshall's related criterion of "contract . . . to perform a particular act"⁶⁸ does "not itself provide a workable test to determine whether a provision in a treaty requires legislative action."⁶⁹ "In almost all treaties one of the 'parties engages to perform a particular act,' "⁷⁰ and such a test has not generally been applied. Similarly, "to take 'futurity of language' as the test makes little sense since the future tense is often used in treaties . . . and it in no way indicates that legislation is necessary."⁷¹ Moreover, as the signatories rarely

⁶⁴ See *id.* at 272.

⁶⁵ See *id.* (emphasis added).

⁶⁶ See *id.* at 244.

⁶⁷ See text at notes 47–54 *supra*.

⁶⁸ See 27 U.S. (2 Pet.) at 314–15.

⁶⁹ See Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643, 645 (1951), reprinted in INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 72 (R. Lillich & F. Newman eds. 1979). For similar views, see, e.g., Henry, *supra* note 47, at 777–78; Iwasawa, *supra* note 47, at 685; Wright, *supra* note 42, at 65 n.12. But see *Robertson v. General Elec. Co.*, 32 F.2d 495, 500 (4th Cir. 1929) (using the "contract" approach without evident knowledge of *Percheman*).

⁷⁰ Schachter, *supra* note 69, at 645.

⁷¹ *Id.*, adding: "The Supreme Court certainly does not consider either [of these supposed tests] as an indication that a treaty is not self-executing." See also *Ex parte Toscano*, 208 F. 938, 942 (S.D. Cal. 1913). Cf. 19 Op. Att'y Gen. 273, 278–79 (1889). For similar views, see, e.g., Henry, *supra* note 47, at 777–78; Iwasawa, *supra* note 47, at 685–86; Comment, *Self-Execution of United Nations Security Council Resolutions Under United States Law*, 24 UCLA L. REV. 387, 394 (1976) [hereinafter UCLA Comment]; Comment, *Criteria for Self-Executing Treaties*, 1968 U.

concern themselves with the details of domestic implementation, treaties are hardly ever addressed "to the political, not the judicial department," or to any domestic governmental apparatus.⁷² Marshall, it may be recalled, had great difficulty applying these criteria to the particular treaty at stake,⁷³ and they seem to be no more useful today. Significantly, some of his earlier opinions lend support to Marshall's language of the treaty criterion. More importantly, he might well have expected, even after 1829, that treaties were to be self-operative, in his words, "[w]henever a right grows out of, or is protected by, a treaty" or persons "have real claims under a treaty."⁷⁴ This latter test (hereinafter termed the rights under a treaty test) would certainly guarantee that human rights treaties were self-operative,⁷⁵ unless a treaty expressly required domestic legislation implementing such rights before they could become operative.

POST-1829 CRITERIA AND SEPARATE LINES OF CASES

After 1829, Marshall retained both the language of the treaty criterion and the rights under a treaty test. As mentioned, he used those criteria in 1833 in reinterpreting the treaty involved in *Foster*.⁷⁶ In 1835 he applied them again in holding that language in a treaty reading "they shall be maintained and protected in the free enjoyment of their liberty, property, and . . . religion" protected the right to property and meant, "then, [that it] is protected and secured by the treaty" in a direct or self-operative manner.⁷⁷ Justice Story, in his 1833 *Commentaries*, seemed to accept Marshall's language of the treaty criterion,⁷⁸ but he stressed that, in most cases, "treaties . . . should be held, when made, to be the supreme law of the land" and that it is "indispensable, that they should have the obligation and force of a law, that they may be executed by the judicial power, and obeyed like other laws."⁷⁹ For Justice Story, treaties "ought to have a positive binding efficacy, as laws,"⁸⁰ and he emphasized that the "difference

ILL. L.F. 238, 242 (1968) [hereinafter Ill. Comment]; Note, *Treaties—Scope of Treaty-Making Power—When Treaties Are Self-Executing*, 26 MICH. L. REV. 316, 320 (1928); note 51 *supra* and accompanying text. But see *Robertson v. General Elec. Co.*, 32 F.2d 495, 500 (4th Cir. 1929); *Ortman v. Stanray Corp.*, 371 F.2d 154, 157 (7th Cir. 1967). Marshall himself must have abandoned such a viewpoint. See note 53 *supra* and text at note 77 *infra*.

⁷² The quoted phrase is Marshall's. 27 U.S. (2 Pet.) at 314. On the general point, see also *Taylor v. Morton*, 23 F. Cas. 784, 785 (C.C.D. Mass. 1855) (No. 13,799); L. HENKIN, *supra* note 27, at 158; Iwasawa, *supra* note 47, at 654, 661, 684. One notable exception is the guarantee of the right to an effective remedy in domestic tribunals contained in human rights instruments.

⁷³ See notes 50, 52 and 53 *supra*.

⁷⁴ See text at notes 35 and 41 *supra*.

⁷⁵ See also note 41 *supra*.

⁷⁶ See text at note 53 *supra*.

⁷⁷ See *Delassus v. United States*, 34 U.S. (9 Pet.) 117, 133 (1835) (Marshall, C.J., opinion). Marshall's treaty language test seems to have been used later in 4 Op. Att'y Gen. 201, 209-10 (1843). See also 21 Op. Att'y Gen. 347, 348 (1896); 19 Op. Att'y Gen. 273, 278-79 (1889); 6 Op. Att'y Gen. 748, 749-50 (1854).

⁷⁸ J. STORY, *supra* note 51, §423 ("when the terms . . . the treaty addresses . . .").

⁷⁹ *Id.* For relevant judicial opinions of Justice Story, see, e.g., notes 36 *supra* and 83 *infra*.

⁸⁰ J. STORY, *supra* note 51, §423.

between considering them as laws, and considering them as executory, or executed contracts, is exceedingly important. . . . If they are supreme laws, courts of justice will enforce them directly in all cases, to which they can be judicially applied"⁸¹

Very few courts, however, paid attention to Marshall's invented distinction between self- and non-self-operative treaties until the end of the 19th century.⁸² Rather, two lines of cases at the Supreme Court level began to emerge: one line (hereinafter termed the invented distinction cases) accepted the general distinction between self- and non-self-operative treaties, while the other (hereinafter termed the law of the land cases) seems simply to have ignored it.⁸³ Exemplifying the second line of cases, in *Worcester v. Georgia* the Court declared: "So long as treaties and laws remain in full force, . . . the judicial power can exercise no discretion in refusing to give effect to those laws, when questions arise under them, unless they shall be deemed unconstitutional."⁸⁴ In *Strother v. Lucas*, there was a cite to *Foster*, but the Court stated flatly: "Treaties are the law of the land, and a rule of

⁸¹ *Id.* Such direct enforcement is also known as direct incorporation, as opposed to indirect incorporation. See also text at notes 124-25 *infra*.

⁸² For cases recognizing such a distinction after 1829, see, e.g., *Terlinden v. Ames*, 184 U.S. 270, 285, 288-89 (1902) (Fuller, C.J., opinion); *Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893); *Chae Chang Ping v. United States*, 130 U.S. 581, 600 (1889); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 630 (1857); *United States v. Flint*, 25 F. Cas. 1107, 1109 (C.C.D. Cal. 1876) (No. 15,121) (Field, Circuit Justice); *In re Metzger*, 17 F. Cas. 232, 233-35 (D.C.S.D.N.Y. 1847) (No. 9,511) (also recognizing that a treaty can enhance judicial power and that if it is "addressed to the judicial power [it can] become a rule of law of" itself and "must be observed and enforced" by the judiciary). See also *Garcia v. Lee*, 37 U.S. (12 Pet.) 511, 519 (1838); *Turner v. American Baptist Missionary Union*, 24 F. Cas. 344, 345 (C.C.D. Mich. 1852) (No. 14,251); *In re Sheazle*, 21 F. Cas. 1214, 1217 (C.C.D. Mass. 1845) (No. 12,734) (President can exercise "ministerial acts" to implement extradition treaty even though no congressional legislation exists); note 45 *supra*. However, in *Sheazle*, the court declared that state magistrates are "bound in all cases to respect treaties and the rights under them." 21 F. Cas. at 1216 (emphasis added).

⁸³ See, e.g., *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 458, 461 (1899); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *United States v. Raucher*, 119 U.S. 407, 418 (1886); *Chew Heong v. United States*, 112 U.S. 536 (1884); *Von Cotzhausen v. Nazro*, 107 U.S. 215, 217 (1883); *Hauenstein v. Lynham*, 100 U.S. 483, 488-90 (1879); *United States v. Forty-Three Gallons of Whisky*, 93 U.S. 188, 197 (1876); *Haver v. Yaker*, 76 U.S. (9 Wall.) 32, 34 (1870); *The New York Indians*, 72 U.S. (5 Wall.) 761, 768, 770, 772 (1867); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 757, 759 (1866); *Doe v. Braden*, 57 U.S. (16 How.) 635, 657-59 (1853); *The Passenger Cases*, 48 U.S. (7 How.) 283, 413 (1849); *Lessee of Pollard's Heirs v. Kibbe*, 39 U.S. (14 Pet.) 353, 412 (1840) (Baldwin, J., concurring); *Carver v. Jackson*, 29 U.S. (4 Pet.) 1, 101 (1830) (Story, J., opinion); *In re Lee Sing*, 43 F. 359, 360-62 (C.C.N.D. Cal. 1890); *In re Parrott*, 1 F. 481, 507, 517 (1880); *Baker v. City of Portland*, 2 F. Cas. 472, 473 (C.C.D. Ore. 1879) (No. 777); 26 Op. Att'y Gen. 250, 251-53 (1907); and cases cited in notes 84-86 *infra*. In one such case it was also recognized: "Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred." *Hauenstein v. Lynham*, 100 U.S. at 487 (citing *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 249-50 (1830)). See also Paust, *Human Rights: From Jurisprudential Inquiry to Effective Litigation*, 56 N.Y.U. L. REV. 227, 240 & n.65 (1981).

⁸⁴ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 593 (1832) (Washington, J.). See also *Hauenstein v. Lynham*, 100 U.S. at 488 (Swayne, J., opinion) ("The efficacy of the treaty is declared and guaranteed by the Constitution" (emphasis added)).

decision in all courts. Their stipulations are binding on the United States"⁸⁵ And in an 1857 case, the Court declared that a ratified treaty "becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation, than they can behind an Act of Congress."⁸⁶

Prior to the 20th century, other judicial opinions seemed to follow this separate line of cases,⁸⁷ and the line has been maintained into this century. For example, in 1909 the Court made no mention of the distinction, while declaring that "[a] treaty, . . . by the express words of the Constitution, is the supreme law of the land, binding alike National and state Courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights."⁸⁸ Some 15 years later, in *Asakura v. City of Seattle*, the Court seemed even less inclined to acknowledge such a distinction:

The rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.⁸⁹

The same has been true of many subsequent cases.⁹⁰

The *Restatement (Third) of Foreign Relations Law of the United States* seeks to explain away this separate line of cases,⁹¹ but it still remains. Interestingly,

⁸⁵ *Strother v. Lucas*, 37 U.S. (12 Pet.) 410, 439 (1838) (Baldwin, J., opinion).

⁸⁶ *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366, 372 (1857).

⁸⁷ See, e.g., note 83 *supra*.

⁸⁸ *Maiorano v. Baltimore & Ohio R.R.*, 213 U.S. 268, 272-73 (1909).

⁸⁹ 265 U.S. 332, 341 (1924). See also Paust, *supra* note 83, at 240 n.65. In view of the many cases that seem to have paid no attention to the question of self-executing versus non-self-executing status, it would be difficult to argue that the Court in *Asakura* "assumed without discussion" that the relevant treaty was self-executing unless such an "assumption" clearly were "the rule" (i.e., that all treaties are "assumed" to be self-executing). See *id.* (addressing Reporters' Note 5 to §131 of the RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) (Tent. Draft No. 1, 1980) [hereinafter 1980 DRAFT RESTATEMENT]); see also RESTATEMENT (THIRD), *supra* note 42, §111 Reporters' Note 5; note 92 *infra*. No such "assumption" is evident, however, in the separate line of cases.

⁹⁰ See, e.g., *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968); *Baker v. Carr*, 369 U.S. 186, 212 (1962); *Kolovrat v. Oregon*, 366 U.S. 187, 190-98 (1961); *Clark v. Allen*, 331 U.S. 503, 508 (1947) (Douglas, J., opinion); *United States v. Pink*, 315 U.S. 203, 231 (1942) (Douglas, J., opinion); *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941); *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 161-62, 166 (1940); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931); *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929); *Jordan v. Tashiro*, 278 U.S. 123, 127-29 (1928); *Cheung Sum She v. Nagle*, 268 U.S. 336, 345-46 (1925); *Filartiga v. Pena-Irala*, 630 F.2d 876, 882-87 (2d Cir. 1980) (a case nonetheless grounded upon a federal statute and arguably thereby "executed," 28 U.S.C. §1350); *Coriolan v. Immigration & Naturalization Serv.*, 559 F.2d 933, 996-97 (5th Cir. 1977); *Kashani v. Immigration & Naturalization Serv.*, 547 F.2d 376, 379 (7th Cir. 1977); *Perre v. United States*, 525 F.2d 933, 935 (5th Cir. 1976); *United States v. Steinberg*, 478 F.Supp. 29, 33 (N.D. Ill. 1979); *Chim Ming v. Marks*, 367 F.Supp. 673, 676-81 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 1170, 1171-72 (2d Cir. 1974) (per curiam), *cert. denied*, 421 U.S. 911 (1975); *Kan Kam Lin v. Rinaldi*, 361 F.Supp. 177, 179 n.1, 183-86 (D.N.J. 1973), *aff'd*, 493 F.2d 1229 (3d Cir.), *cert. denied*, 419 U.S. 974 (1974).

⁹¹ See note 89 *supra*.

however, the new *Restatement* also seems to have used these and other cases as support for the general presumption that treaties are self-executing. The *Restatement* not only recognizes non-self-execution as an exception to the duty of courts to give effect to international law "as law,"⁹² but also declares: "In general, agreements that can be readily given effect . . . are deemed self-executing, unless a contrary intention is manifest."⁹³ Furthermore, the *Restatement* basically adopts Marshall's criterion of the language of the treaty considered in context, as to self-executing status,⁹⁴ but adds that in some rare cases implementing legislation may be "constitutionally required."⁹⁵ In practice, the language of the treaty test has found significant acceptance,⁹⁶ and some cases have sought to elucidate other aspects of context that might be considered while focusing on language and probable intent.⁹⁷

⁹² See RESTATEMENT (THIRD), *supra* note 42, §111(3) and (4). The test of non-self-execution set forth in §111(4) strengthens such a presumption, since non-self-execution only exists "if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation" or in a "rare" case (see note 95 *infra*) where legislation is "constitutionally required." *Id.* Since such agreements are rare, the presumption will be strong that treaties are self-executing. The newer version of Reporters' Note 5 retains this general presumption and also identifies a "strong presumption" of self-execution "if the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation." *Id.* §111 Reporters' Note 5. See also *Aerovias Interamericanas de Panama, S.A. v. Board of County Comm'rs*, 197 F.Supp. 230, 248 (S.D. Fla. 1961) (presumed self-executing if no executive request for legislation), *rev'd on other grounds sub nom. Board of County Comm'rs v. Aerolineas Peruanas*, 307 F.2d 802 (5th Cir. 1962), *cert. denied*, 371 U.S. 961 (1963); L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW* 202 (2d ed. 1987); Ill. Comment, *supra* note 71, at 243, 248. The new version of the *Restatement* adds: "Obligations not to act, or to act only subject to limitations, are generally self-executing." RESTATEMENT (THIRD), *supra*, §111 Reporters' Note 5 (citing and later quoting *Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697, 702-03 (1878)).

⁹³ RESTATEMENT (THIRD), *supra* note 42, §111 Reporters' Note 5 (emphasis added). This presumption is recognized by others. See, e.g., *Amaya v. Stanolind Oil & Gas Co.*, 158 F.2d 554, 556 (5th Cir. 1947); N. REDLICH & B. SCHWARTZ, *supra* note 51, at 3-107; B. SCHWARTZ, *supra* note 51, at 102; Iwasawa, *supra* note 47, at 656, 668 n.184; Ill. Comment, *supra* note 71, at 248. See also Henkin, *supra* note 51.

⁹⁴ See RESTATEMENT (THIRD), *supra* note 42, §111(4) ("if the agreement manifests an intention that it shall not become effective as domestic law"), §111 Reporters' Note 5 (quoting Marshall), and *id.* ("unless a contrary intention is manifest"). This, of course, with the strong presumption noted in note 92 *supra*.

⁹⁵ See RESTATEMENT (THIRD), *supra* note 42, §111(4). See also *id.* §111 Reporters' Note 6. A previous draft recognized that such instances would be "rare." See RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §131(4) (Tent. Draft No. 6, 1985) [hereinafter 1985 DRAFT RESTATEMENT].

⁹⁶ See notes 51 and 82 *supra*.

⁹⁷ See, e.g., *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90, 97 (9th Cir. 1974) (citing M. McDUGAL, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967)); Ill. Comment, *supra* note 71, at 239-41. For extensive treatment of related factors considered by the courts, see Iwasawa, *supra* note 47, at 653-75, 681-85, and references cited. See also Note, *When Are Treaties Self-Executing?*, 31 NEB. L. REV. 463, 467-71 (1952).

The infamous *Sei Fujii* case, an old opinion of the California Supreme Court, also adopted a language considered in context approach, while concluding that relevant treaty provisions were not obligatory and lacked specificity. See *Sei Fujii v. California*, 38 Cal. 718, 722-25, 242

From the above, it is evident that Marshall's approach and the *Restatement's* presumption and general test can be compatible with the text of the Constitution and the predominant views of the Framers. Again, all treaties, to the extent of their grants, guarantees or obligations, are self-executing. Those that are not are those which, by their terms, require domestic implementing legislation or otherwise express an intention that they not be self-operative. Thus, non-self-execution is to be tested by the language of the treaty considered in context and, according to the *Restatement*, against a strong presumption of self-execution.⁹⁸

THE ROLE OF CONGRESSIONAL POWER

Need one stress that this rediscovered view rejects completely the current insistence that certain treaties are inherently non-self-executing because legislative power exists, for example, to regulate commerce, to define and punish crimes, and to appropriate money?⁹⁹ The Senate and President also

P.2d 617, 620-22 (1952). Use of these two bases for the court's conclusion that the treaty provisions were not self-executing was not really questioned as such, but the specific application and choices were questioned. *See, e.g.,* Wright, *supra* note 42. Further, subsequent events have obviated both prongs of the court's conclusion and it has been recognized that the degree of "specificity" needed for judicial application is not great. *See, e.g.,* Paust, *supra* note 83, at 239 & n.59; Schachter, *supra* note 69, at 652, 655.

The fact that a treaty addresses an obligation of signatories to assure that any necessary implementing legislation is forthcoming is not determinative. *See, e.g.,* Burke, Coliver, de la Vega & Rosenbaum, *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 291, 302 (1983); Iwasawa, *supra* note 47, at 658-61, and references cited; Ill. Comment, *supra* note 71, at 241 & n.20. First, whether or not legislation is "necessary" in the United States is the very question at stake. Second, such a treaty provision may well be directed at other countries where treaties cannot be self-executing. *See, e.g.,* Iwasawa, *supra* note 47, at 660-61 & nn.144, 152; Ill. Comment, *supra* note 71, at 241 & n.20. Third, such a clause may merely seek greater assurance of a directly operative effect in countries where legislation is not constitutionally "necessary." *See* Iwasawa, *supra*, at 660; American Convention on Human Rights, Art. 2, opened for signature Nov. 22, 1969, reprinted in ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser. L/V/II.65, doc. 6, at 63 (1985); International Covenant on Civil and Political Rights, Art. 2(2), GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966). In countries where the treaty can be self-executing, additional legislation is simply not "necessary." Legislation would also not be "necessary" further to "ensure" self-operative effect if prior legislation were already operative to "execute" the particular treaty or such treaties more generally (or portions of them), it being recognized that treaties could be "executed" by any form of legislation. Fourth, text writers have recognized that the legislative history of relevant human rights treaties demonstrates that the parties "never intended to deny their self-executing character by inserting domestic implementation clauses." Iwasawa, *supra*, at 660. Moreover, this recognition is strengthened by the fact that the right to an effective remedy in domestic tribunals for human rights deprivations is customary and is expressed elsewhere in the treaty as an independent right. *See, e.g.,* Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. (1988); American Convention on Human Rights, *supra*, Art. 25. Further, language such as "undertakes to ensure" has a mandatory quality unlike words such as "could" or "may," which are usually discretionary.

⁹⁸ *See* notes 92-94 *supra*.

⁹⁹ For examples of this approach, see, e.g., E. CORWIN, THE PRESIDENT, OFFICE AND POWERS 1787-1957, at 195 (4th rev. ed. 1957); L. HENKIN, *supra* note 27, at 159 (re appro-

have an express power to make a treaty, which is supreme law of the land, and the mere existence of a concurrent power does not obviate either the existence or the exercise of another.¹⁰⁰ Indeed, to claim that certain treaties

priations, crime, war; but see *id.* at 149, 159 n.††, 160); H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 584 (2d ed. 1976) (citing *The Over the Top*, 5 F.2d 833, 845 (D. Conn. 1925), re revenue matters and crime; actually, the case spoke of "fiscal" matters and appropriations, and the treaty involved was later found to be self-executing in *Cook v. United States*, 288 U.S. 102, 118-19 (1933)); R. ROTUNDA, *MODERN CONSTITUTIONAL LAW* 232 (2d ed. 1985); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 167-68 (1978) (citing *Turner v. American Baptist Missionary Union*, 24 F. Cas. 344 (C.C.D. Mich. 1852) (No. 14,251)); 14 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 305 (1970); Anderson, *The Extent and Limitations of the Treaty-Making Power Under the Constitution*, 1 AJIL 636, 653 (1907); Dickinson, *Are the Liquor Treaties Self-Executing?*, 20 AJIL 444, 448-49 (1926) (*cf. id.* at 449-50); Evans, *Some Aspects of the Problem of Self-Executing Treaties*, 45 ASIL PROC. 66, 71, 74 (1951) (*but see id.* at 72-74) [hereinafter Evans I]; Evans, *Self-Executing Treaties in the United States of America*, 30 BRIT. Y.B. INT'L L. 178, 185, 187 (1954) (*but see id.* at 186-87, 190-91, also listing cases involving self-executing treaties) [hereinafter Evans II]; Henkin, *supra* note 42, at 868 n.70 (reading *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812), too broadly re common law crime); Henry, *supra* note 47, at 780 (*but see id.* at 782 re crimes); Iwasawa, *supra* note 47, at 676-78 (*cf. id.* at 676-77); Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AJIL 892, 898 n.30 (1980); Schachter, *supra* note 69, at 645; Wright, *supra* note 42, at 68, 77-78; UCLA Comment, *supra* note 71, at 399-400 (re appropriations; but see *id.*, all others can be self-executing); Note, *supra* note 97, at 472-74 (*but see id.* at 471-74); *cf. Paust, After My Lai: The Case for War Crime Jurisdiction over Civilians in Federal District Courts*, 50 TEX. L. REV. 6, 9 n.10 (1971) (assumed better view at the time re crime), reprinted in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 447, 450 n.10 (R. Falk ed. 1976); Wright, *Treaties and the Constitutional Separation of Powers in the United States*, 12 AJIL 64 (1918); *British Caledonian Airways v. Bond*, 665 F.2d 1153, 1160 D.C. Cir. 1981; *Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980); *Edwards v. Carter*, 580 F.2d 1055, 1057 n.4 (Raoul Berger), 1058 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978) (*but see id.* at 1057-58); *Swearingen v. United States*, 565 F.Supp. 1019, 1022 (D. Colo. 1983) (citing *Edwards*); *Aerovias Interamericanas de Panama, S.A. v. Board of County Comm'rs*, 197 F.Supp. 230, 246 (S.D. Fla. 1961) (citing *Turner*, 24 F. Cas. 344).

¹⁰⁰ See *Edwards v. Carter*, 580 F.2d at 1058-59 (discussed in text at notes 111-21 *infra*); *Indemnity Ins. Co. of N. Am. v. Pan Am. Airways*, 58 F.Supp. 338, 339-40 (S.D.N.Y. 1944); see also *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 103-10 (1801). Several treaties have had a self-executing or self-operative effect despite the existence of some concurrent congressional power. See, e.g., *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252, *reh'g denied*, 467 U.S. 1231 (1984); *Cook v. United States*, 288 U.S. 102, 119 (1933); *Charlton v. Kelley*, 229 U.S. 447 (1913); *Johnson v. Browne*, 205 U.S. 309 (1907); *Francis v. Francis*, 203 U.S. 233, 241-42 (1906); *Ward v. Race Horse*, 163 U.S. 504 (1896); *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889); *Smith v. Canadian Pacific Airways*, 452 F.2d 798, 801-02 (2d Cir. 1971); *Vanity Fair Mills v. T. Eaton Co.*, 254 F.2d 633, 640 & n.9 (2d Cir. 1956); *Master v. Cribben & Sexton Co.*, 202 F.2d 779, 783 (C.C.P.A. 1953); *Pettibone v. Cook County, Minn.*, 120 F.2d 850, 854-55 (8th Cir. 1941); *John T. Bill Co. v. United States*, 104 F.2d 67, 73 (C.C.P.A. 1939); *United States v. Garrow*, 88 F.2d 318, 320 (C.C.P.A. 1937) (re customs); *The Pictonian*, 3 F.2d 145, 147 (E.D.N.Y. 1924) (re extension of criminal jurisdiction), *rev'd on other grounds*, 20 F.2d 353 (2d Cir. 1927); *Hennebique Const. Co. v. Myers*, 172 F. 869, 873-74 (Gray, J.), 887-88 (Archbald, D.J.) (5d Cir. 1909); *Hannevig v. United States*, 84 F.Supp. 743, 744-45 (Ct. Cl. 1949); *Petition of Georgakopoulos*, 81 F.Supp. 411, 413 (E.D. Pa. 1948); *American Express Co. v. United States*, 4 Ct. Cust. App. 146 (1913); *United States v. Kelly*, 2 Extrater. Cases 665, 669-70 (U.S.C. Chira 1923) (treaty prohibiting contraband trade can be self-executing for criminal sanction purposes); Ill. Comment, *supra* note 71, at 243; UCLA Comment, *supra* note 71, at 399-400; notes 34, 37, 51, 53, 55, 77, 83,

should be inherently non-self-executing merely because Congress has a relevant concurrent power is to ignore or subvert the separation of powers between the legislative and judicial branches, to rewrite the Constitution at the expense of the treaty power. It is the judiciary, not Congress, that has been granted the power (indeed, the textual commitment) under Article III of the Constitution to apply treaty law in cases or controversies otherwise properly before the courts.¹⁰¹

For these or related reasons, commentators and others have recognized that treaty provisions can be directly applicable despite the existence of a relevant congressional power,¹⁰² and the same recognition has appeared in recent cases.¹⁰³ Nonetheless, the *Restatement (Third)* seeks to retain the possibility that a treaty may not be self-executing in a case where "implementing legislation is constitutionally required."¹⁰⁴ This test does not answer the question at stake, i.e., whether legislation is "constitutionally required." Thus, this test, as the new *Restatement* recognizes, might only apply where

86 and 90 *supra*. See also *INS v. Stevic*, 467 U.S. 407, 428 n.22 (1984); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 42 (1943); *The Three Friends*, 166 U.S. 1, 53 (1897) (crimes); *Reichert v. Felps*, 73 U.S. (6 Wall.) 160, 165-66 (1868); *United States v. Moreno*, 68 U.S. (1 Wall.) 400, 404, (1864); *United States v. Worrall*, 2 U.S. (2 Dall.) 384, 391 (Chase, J.), 395 (Peters, J.) (C.C.D. Pa. 1798); *Robertson v. General Elec. Co.*, 32 F.2d 495, 500 (4th Cir. 1929); *Morris v. United States*, 161 F. 672, 675 (8th Cir. 1908); 7 Op. Att'y Gen: 746, 750 (1856); *cf. United States v. Mason*, 344 F.2d 673, 683-85 (2d Cir. 1965). See further *United States v. Ragsdale*, 27 F. Cas. 684, 686 (C.C.D. Ark. 1847) (No. 16,113).

¹⁰¹ See note 1 *supra*. To decide otherwise would be to undermine both the treaty power and judicial power, and thus to disrupt the proper balance of power the Constitution sought to establish, by preventing the judiciary and the executive branch from accomplishing their constitutionally assigned responsibilities. For this reason also, appropriate concern for the separation of powers compels recognition that a court that refuses for some specious reason to apply international law denies its own validity. When human rights are at stake, such a court may also be denying or disparaging human rights within the meaning of the Ninth Amendment. See Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 234-37, 249, 257-60, 266-67 (1975); note 41 *supra*.

¹⁰² See, e.g., Representative Marshall, quoted in note 34 *supra*; Anderson, *supra* note 99, at 653, 655, 657, 664; McDougal & Arens, *The Genocide Convention and the Constitution*, 3 VAND. L. REV. 683, 690-91 (1950) (*cf. id.* at 693 n.63); Hamilton (re taxes, quoted in Lobel, *supra* note 28, at 1098); Palmer, *The Federal Common Law of Crime*, 4 LAW & HIST. REV. 267, 276, 277 n.63 (1986) (also quoting Representative Marshall, 10 ANNALS OF CONG. 607 (1800)); note 55 *supra*; Ill. Comment, *supra* note 71, at 243; UCLA Comment, *supra* note 71, at 399-400 (*but see id.*; one exception involves appropriations). See also text at notes 10-11 and 26 *supra*; Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 159-61 (1795) (Iredell, J.); 1 Op. Att'y Gen. 68, 69 (1797) ("law of nations" can be self-operative for criminal sanction purposes); J. HENDRY, TREATIES AND FEDERAL CONSTITUTIONS 92 (1955) (citing 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 16-17 (1943)); Dickinson, *supra* note 99, at 449-50 (re crimes); Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 36-38 (1952); Evans I, *supra* note 99, at 72-74 (re taxes, revenue, duties, commercial matters, trademarks); Evans II, *supra* note 99, at 190-91; Henry, *supra* note 47, at 782 (re crimes); McLaughlin, *supra* note 31, at 749; Nathanson, *The Constitution and World Government*, 57 NW. U.L. REV. 355, 362-64 & n.16 (1962); Paust, *supra* note 99; Note, *supra* note 97, at 471-74; *cf. Marshall, supra*: "But the Judicial power cannot extend to political compacts: so as to allow Courts to 'execute' such compacts" (emphasis added).

¹⁰³ See note 100 *supra*.

¹⁰⁴ See RESTATEMENT (THIRD), *supra* note 42, §111(4).

Congress is thought to have an exclusive power (i.e., not merely a concurrent power with respect to matters that can also be effectuated by treaty).¹⁰⁵ The *Restatement* even adds: "That a subject is within the legislative power of Congress does not preclude a treaty on the same subject."¹⁰⁶

Yet the *Restatement* assumes that agreements involving the appropriation of funds do require congressional action.¹⁰⁷ More cautiously, the *Restatement* states that it has been "assumed" that agreements creating a state of war or a crime or calling for punishment of certain conduct require congressional implementing legislation,¹⁰⁸ adding that "[i]t has also been suggested" that treaties cannot "raise revenue" by imposing taxes or tariffs.¹⁰⁹ A Reporters' Note remarks more openly:

There is no definitive authority for the rule set forth . . . that agreements on some subjects cannot be self-executing. . . . No particular clause of the Constitution conferring power on Congress states or clearly implies that the power can be exercised only by Congress and not by treaty. . . .

The principle declared . . . is nevertheless generally assumed for the cases given.¹¹⁰

What the Reporters' Note nearly admits is that powers conferred on Congress by Article I, section 8 of the Constitution are merely concurrent powers, not exclusive powers. This recognition was even more evident in *Edwards v. Carter*, although there the circuit court was uncomfortable with the notion that none of the section 8 powers (especially the war power) were exclusive. As the majority found in *Edwards*:

The grant of authority to Congress under the property clause states that "The Congress shall have Power . . .," not that only the Congress shall have power, or that the Congress shall have *exclusive* power. In this respect the property clause is parallel to Article I, §8, which also states that "The Congress shall have Power . . ." Many of the powers thereafter enumerated in §8 involve matters that were at the time the Constitution was adopted, and that are at the present time, also commonly the subject of treaties. The most prominent example of this is the regulation of commerce with foreign nations, Art. I, §8, cl. 3, and appellants do not go so far as to contend that the treaty process is not a constitutionally allowable means for regulating foreign commerce. It thus seems to us that, on its face, the property clause is intended not to restrict the scope of the treaty clause, but, rather, is intended to permit

¹⁰⁵ See *id.* §111 comment *i* ("if the agreement would achieve what lies within the *exclusive* law-making power of Congress under the Constitution" (emphasis added)).

¹⁰⁶ *Id.* §111 Reporters' Note 6.

¹⁰⁷ See *id.* §111 comment *i* ("Thus . . . requires").

¹⁰⁸ See *id.* and §111 Reporters' Note 6. But see note 102 *supra*.

¹⁰⁹ See RESTATEMENT (THIRD), *supra* note 42, §111 comment *i*. But see note 102 *supra*.

¹¹⁰ RESTATEMENT (THIRD), *supra* note 42, §111 Reporters' Note 6, adding: "But see the dissenting opinion in *Edwards v. Carter* . . ." There are no Supreme Court opinions supporting such assumptions and relevant judicial opinions are extremely rare. See note 99 *supra*. Cf. note 116 *infra* on the *sui generis* power of Congress to declare war.

Congress to accomplish through legislation what may *concurrently* be accomplished through other means provided in the Constitution.¹¹¹

With respect to the war power conferred by Article I, section 8, clause 11, the court merely stated: "The *sui generis* nature of a declaration of war and the unique history indicating the Framers' desire to have both Houses of Congress concur in such a declaration, may place it apart from the other congressional powers enumerated in Art. I, §8 and in Art. IV, §3, cl. 2."¹¹²

Yet, with respect to exclusive powers of the full Congress (which cannot be fully effectuated domestically by a self-executing treaty alone), the court offered a distinction between section 8 powers (almost all of which are concurrent) and those conferred by certain portions of sections 7 and 9:

There are certain grants of authority to Congress which are, by their very terms, *exclusive*. In these areas, the treaty-making power and the power of Congress are not concurrent; rather, the only department of the federal government authorized to take action is the Congress. For instance, the Constitution expressly provides only one method—congressional enactment—for the *appropriation of money*:

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.

Art. I, §9, cl. 7. Thus, the expenditure of funds by the United States cannot be accomplished by self-executing treaty; implementing legislation appropriating such funds is indispensable. Similarly, the constitutional mandate that "all *Bills for raising Revenue* shall originate in the House of Representatives," Art. I, §7, cl. 1, appears, by reason of the restrictive language used, to prohibit the use of the treaty power to impose taxes.¹¹³

¹¹¹ 580 F.2d at 1057-58 (emphasis added), adding:

The American Law Institute's Restatement of Foreign Relations, directly addressing this issue, comes to the same conclusion we reach:

The mere fact, however, that a congressional power exists does not mean that the power is exclusive so as to preclude the making of a self-executing treaty within the area of that power.

ALI Restatement of Foreign Relations Law (2d), §141, at 435 (1965).

580 F.2d at 1058.

¹¹² 580 F.2d at 1058 n.7. See also note 116 *infra*.

¹¹³ 580 F.2d at 1058 (emphasis added), adding:

These particular grants of power to Congress operate to limit the treaty power because the language of these provisions clearly precludes any method of appropriating money or raising taxes other than through the enactment of laws by the full Congress. This is to be contrasted with the power-granting language in Art. I, §8, and in Art. IV, §3, cl. 2. Rather than stating the particular matter of concern and providing that the enactment of a law is the only way for the federal government to take action regarding that matter, these provisions state simply that Congress shall have power to take action on the matters enumerated.

Id. at 1059.

In my opinion, this overall distinction (hereinafter termed the *Edwards* rationale) generally makes sense. Moreover, unlike the *Restatement's* retained assumptions about inherently non-self-executing treaties, the *Edwards* rationale seems to leave very few exclusive powers to the full Congress and, thus, very few circumstances in which a treaty would be inherently non-self-executing. In particular, treaties creating an international crime or requiring punishments could be self-executing,¹¹⁴ and so could treaties creating taxes or tariffs.¹¹⁵ If it were not for its *sui generis* nature and history, the war power might also be thought to be nonexclusive.¹¹⁶ If it were, every section 8 power, at least, would be nonexclusive and, thus, treaties implicating those powers could be self-executing. Significantly, a few of the Founders thought that such a nearly unrestrained and self-operative treaty power would exist, but that it would be balanced in part by an exclusive power of the House and Senate to appropriate money.¹¹⁷

Nonetheless, there are problems with some of the specific choices made by the *Edwards* court while applying the general rationale. Just because all "Bills" for raising revenue shall originate in the House,¹¹⁸ it does not follow that revenue may be raised in no other way.¹¹⁹ Further, is there a difference

¹¹⁴ See U.S. CONST. art. I, §8, cl. 10; notes 100 and 102 *supra*. See also Note, *supra* note 97, at 473. But see note 99 *supra*.

¹¹⁵ See U.S. CONST. art. I, §8, cls. 1 and 3; notes 100 and 102 *supra*. But see text at note 113 *supra* (*Edwards*, considering Art. I, §7, cl. 1 to prohibit taxes by treaty); note 99 *supra*.

¹¹⁶ Compare U.S. CONST. art. I, §8, cl. 11, with text at note 112 *supra*. See also U.S. CONST. art. I, §8, cls. 12-15; P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 435 (1975) (recognizing that the Founders "rejected a resolution that would have lodged the war power in the president and Senate" (citing 1 Farrand (ed.), *supra* note 2, at 292, 300)); Iwasawa, *supra* note 47, at 677-78 & n.251; Murphy, *Treaties and International Agreements Other Than Treaties: Constitutional Allocation of Power and Responsibility Among the President, the House of Representatives, and the Senate*, 23 KANS. L. REV. 221, 224-30, 241-42, 245 (1975); 3 Falk (ed.), *supra* note 99, at 489-91 (1972); 4 *id.* at 535-818; THE FEDERALIST NO. 64, at 420 (Jay) ("power of making treaties is an important one, especially as it relates to war"); Paust, *supra* note 40, at 416-18 ("war power" exception to last-in-time rule accepts treaty-based international law as a restraint on congressional power); RESTATEMENT (THIRD), *supra* note 42, §111 Reporters' Note 6 ("The power of Congress to declare war is not characterized or designated in any way that would distinguish it from, say, the power to regulate commerce . . .").

A declaration of war is not the equivalent of legislation or a "law," but is the outcome of an exercise of a *sui generis* power. See, e.g., *Brown v. United States*, 12 U.S. (8 Cranch) 110, 125-26 (1814) (Marshall, C.J., opinion). This might distinguish that portion of the "war power" so as to allow the conclusion that no treaty constitutionally could declare war, although treaties regulating the conduct of war certainly could be self-executing. See also 50 U.S.C. §§1541, 1547(a)(2) (1982) (§8(a)(2) of the War Powers Resolution: no authority to introduce forces shall be inferred "from any treaty . . . unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces"). Further, there is significant judicial precedent to the effect that the war power (unlike others here mentioned) is vested in the full Congress. See, e.g., *The Prize Cases*, 67 U.S. (2 Black) 535, 668 (1862); *Brown v. United States*, *supra*; *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800). See also Glennon, *United States Mutual Security Treaties: The Commitment Myth*, 24 COLUM. J. TRANSNAT'L L. 509 (1986); Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad*, 8 WHITTIER L. REV. 711, 718-19 n.21 (1986).

¹¹⁷ See 4 Elliot (ed.), *supra* note 15, at 129 (Iredell), 438 (Lyman).

¹¹⁸ U.S. CONST. art. I, §7, cl. 1; text at note 113 *supra*.

¹¹⁹ See also notes 102 and 115 *supra*.

between section 8 powers and that mentioned in section 9, clause 7 of the Constitution? Under the latter, no money can be appropriated "but in Consequence of Appropriations made by Law." The word "Law" in section 9, clause 7 is not limited by the words "House" (as in section 7) or "Congress" (as in section 9, clause 1 ["not . . . by the Congress"]) and section 8 ["no Person . . . without the Consent of Congress"]), or even "exclusive Legislation" (as in section 8, clause 17). Moreover, the word "Law" also appears in Article III, section 2, clause 1 ("The judicial Power shall extend to all Cases, in Law . . . , arising under . . . Treaties") and Article VI, clause 2 (e.g., "supreme Law of the Land," covering also "all Treaties"), which suggests that the appropriations power is not exclusive to Congress.¹²⁰

If so, it may well be that no treaty is inherently non-self-executing in the face of some congressional power. Using the *Edwards* rationale (but not all of the conclusory dicta), one can see that, with the exception of the war power, no seemingly relevant congressional power is exclusive.¹²¹ Thus, as the text of the Constitution and almost all of the Founders seem to affirm,¹²² legislation is not constitutionally required in any seemingly relevant circumstance and, as the predominant view of the Framers demonstrates, all treaties are supreme federal law and, potentially, are directly operative. Treaties that are not directly operative are those which by their terms are not "self-executing." It is worth repeating that any judicial opinions to the contrary are extremely rare and less than authoritative.¹²³

LEGAL EFFECTS OF NON-SELF-EXECUTING TREATIES

It is important to note that even non-self-executing treaties can produce legal effects. Although such treaties cannot operate directly without implementing legislation, they can be used indirectly as a means of interpreting relevant constitutional, statutory, common law or other legal provisions.¹²⁴ Indirect incorporation of international law, moreover, is the most prevalent form of judicial incorporation.¹²⁵

¹²⁰ See also Evans II, *supra* note 99, at 185 n.3 ("It is possible to argue, however, that . . . appropriations may be made by treaty" (citing Feidler & Dwan, *The Extent of the Treaty-Making Power*, 28 GEO. L.J. 187, 192 (1939)); RESTATEMENT (THIRD), *supra* note 42, §111 Reporters' Note 6 (might be "possible to conclude that since treaties are declared to be 'law' (Art. VI) and are treated as equal to an act of Congress for other purposes, an appropriation of funds through an international agreement is an appropriation 'made by law' "). But see *id.* §111 comment i (appropriation of funds listed as "exclusive law-making power of Congress").

¹²¹ But see RESTATEMENT (THIRD), *supra* note 42, §111 Reporters' Note 6 (addressing Art. I, §8, cl. 17, "exclusive legislation," which might even be distinguished from the term "Law"); notes 112 and 116 *supra* (re war power as *sui generis*).

¹²² But see text at note 117 *supra*.

¹²³ See note 111 *supra* and accompanying text; see also note 99 *supra*.

¹²⁴ See, e.g., Iwasawa, *supra* note 47, at 687, 689-90 (& nn.323, 328), 692; Paust, *supra* note 40, at 403-05, and references cited; Paust, *supra* note 83, at 240-42, 244.

¹²⁵ See note 124 *supra*.

An early draft of the new *Restatement*¹²⁶ had mirrored an incorrect and overly broad statement in an opinion of the Court of Appeals for the Fifth Circuit that "treaties affect" domestic law only when they "are given effect by congressional legislation or are, by their nature, self-executing."¹²⁷ As argued in a prior writing, however, such assertions are clearly out of line with predominant trends in judicial decision and are fallacious for at least three reasons.¹²⁸ First, the self-executing treaty doctrine does not apply to customary international law.¹²⁹ The doctrine therefore poses no obstacle to the direct incorporation of customary norms for use in domestic litigation. Because non-self-executing treaties often are evidence of customary international law, these treaties can affect the municipal law of the United States. Second, although some decisions pay great attention to the self-executing treaty doctrine, usually so as to deny claims of incorporation, in another line of cases treaty provisions have been incorporated directly for judicial use without any mention of the doctrine.¹³⁰ Third, non-self-executing treaties are available for interpretive purposes and, thus, can at least affect domestic law indirectly.

CONCLUSION

From the above, it seems clear that the text of the Constitution, the predominant views of the Founders, and early and more modern trends in judicial decision all demand that certain notions of several text writers with respect to the inherently non-self-executing nature of certain types of treaties be abandoned. The constitutionally preferable view is that no treaty is inherently non-self-executing except those which would seek to declare war on behalf of the United States.¹³¹ With the exception of the *sui generis* power of Congress to declare war, the mere existence of a congressional power does not mean that it is exclusive and would obviate any potentially self-executing effect of a treaty.

From these sources, it also seems clear that all treaties are self-executing except those (or the portions of them) which, by their terms considered in context, require domestic implementing legislation or seek to declare war on behalf of the United States. All treaties are supreme federal law, but some treaties, by their terms, are not directly operative. Finally, even non-self-executing treaties can produce and have produced domestic legal effects through indirect incorporation, by which a treaty norm is utilized as an aid in interpreting the Constitution, a statute, common law or some other legal provision.

¹²⁶ See 1980 DRAFT RESTATEMENT, *supra* note 89, §131(3) ("given effect only after"). Section 131(3) was changed in the 1985 draft to read: "not be given effect as law" and should have read "not be given effect directly as law." See 1985 DRAFT RESTATEMENT, *supra* note 95; Paust, *supra* note 40, at 403-04 n.14, 446-47.

¹²⁷ *United States v. Postal*, 589 F.2d 862, 875 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979).

¹²⁸ See Paust, *supra* note 83, at 239-40.

¹²⁹ See *id.* at 240 n.63.

¹³⁰ See text at notes 83-90 *supra*.

¹³¹ See note 116 *supra*.

The word "self-executing" may or may not be felicitous,¹³² but awareness of the actual text of the Constitution, the predominant views of the Founders, early and more modern judicial opinions, and a proper separation of powers should prove a useful counter to ambiguity and the contrary "assumptions" of text writers. In this time of the bicentennial, it is appropriate to reaffirm the text of the Constitution and expectations of the Founders that all treaties will be the supreme law of the land.

¹³² See McDougal, Remarks, 45 ASIL PROC. 102 (1951) ("this word 'self-executing' is essentially meaningless, and . . . the quicker we drop it from our vocabulary the better for clarity and understanding").

AGORA: THE U.S. DECISION NOT TO RATIFY PROTOCOL I TO THE GENEVA CONVENTIONS ON THE PROTECTION OF WAR VICTIMS (CONT'D)

THE RATIONALE FOR THE UNITED STATES DECISION

The October 1987 issue of the *Journal* contains an article written by Hans-Peter Gasser,¹ the Legal Adviser to the Directorate of the International Committee of the Red Cross (ICRC), on the U.S. decision not to ratify Protocol I (on international armed conflicts) to the 1949 Geneva Conventions on the Protection of War Victims. Unfortunately, the *Journal* did not include any response by the administration, but only the President's necessarily brief letter of transmittal to the Senate of January 18, 1987, recommending advice and consent to ratification of Protocol II (on noninternational conflicts).² The President's letter of transmittal was not intended to be an exhaustive statement of the U.S. objections to Protocol I, nor does it purport to be such.

The underlying assumption of Dr. Gasser's article is that the United States is somehow obligated to ratify or accede to Protocol I simply because it was adopted by the Geneva Conference. We disagree. We appreciate that Protocol I was the product of a substantial effort by the Swiss Government and the ICRC to alleviate the plight of victims of war. Nonetheless, each sovereign state must make its decision on whether to ratify such agreements based on a comprehensive assessment of their merits, including the consequences of ratification.

The United States would have preferred to ratify Protocol I, since it contains some sound and meritorious elements. The new provisions on the missing and dead and on protection of medical aircraft are in this category, and are largely designed to address problems experienced by members of the U.S. Armed Forces during the Vietnam conflict. We will support efforts to have these provisions observed and in time recognized as customary international law.

The enforcement provisions of the Protocol give no assurance, however, that these provisions would actually be complied with. Further, the Protocol also contains provisions that the United States cannot accept from a military, political or humanitarian standpoint. These problems were raised at the conference, and they should come as no surprise. The unfortunate fact is that Third World and other countries chose not to respect our strong views and those of our European allies, and thus chose to create a new legal regime that we find unacceptable.

¹ Gasser, *An Appeal for Ratification by the United States*, 81 AJIL 912 (1987).

² *Letter of Transmittal*, *id.* at 910. The President's letter of transmittal and Dr. Gasser's article constituted an *Agora* section entitled "The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims."

The Joint Chiefs of Staff, after a careful and extensive study, concluded that Protocol I is unacceptable from the point of view of military operations. The reasons, spelled out in a detailed JCS report of more than a hundred pages, include the fact that the Protocol grants irregulars a legal status which is at times superior to that accorded regular forces; that it unreasonably restricts attacks against certain objects that have traditionally been legitimate targets; and that it eliminates significant remedies in cases where an enemy violates the Protocol. The total elimination of the right of reprisal, for example, would hamper the ability of the United States to respond to an enemy's intentional disregard of the limitations established in the Geneva Conventions of 1949 or Protocol I, for the purpose of deterring such disregard. Before ratifying any agreement that deals with U.S. national security, we must be satisfied that the terms of the agreement are reasonable and that they can be implemented without undue consequences in terms of U.S. casualties. Our Joint Chiefs of Staff have unanimously concluded that this is clearly not the case with respect to Protocol I. U.S. soldiers would have to pay the price for such unreasonable limitations through unnecessary casualties and charges of criminal activity.

From a political standpoint, the principal deficiency is that part of Protocol I which deals with so-called wars of national liberation. Traditionally, the law of war has recognized two general categories of armed conflicts—international armed conflicts (e.g., conflicts between sovereign states) and internal ones (e.g., civil wars). No distinction has ever previously been made under the law of war based on the cause for which one of the parties claims to be fighting. Rather, the law of war has had some degree of success in the world because it attempts to be objective in its categorization of conflicts rather than using subjective and hence political and controversial concepts. Neutral principles are vital in the laws of war, since no party is ever prepared to apply rules of warfare on the assumption that its opponent has been wronged, and particularly that the opponent is justifiably fighting to be “liberated.”

As the record of the 1974 session of the Diplomatic Conference demonstrates, Third World states (which numerically dominated the conference) were not interested in applying the rules of international armed conflict to ordinary civil wars, but insisted on applying these rules to civil wars that involved causes they favored—the so-called wars of national liberation, specifically those being conducted by the Palestine Liberation Organization and the liberation movements of southern Africa. To accomplish this objective, they pushed through a provision—Article 1(4) of Protocol I—that treats as international armed conflicts those noninternational conflicts in which “peoples are fighting against colonial domination and alien occupation and racist régimes.”

One result of this provision, if actually applied, would be that those fighting for such causes would theoretically obtain prisoner-of-war status if captured, and thus immunity from prosecution for belligerent acts. On the other hand, those fighting for less-favored political causes (at least from a Third World perspective) would be treated under the rules of internal

conflicts, and would not receive POW status or immunity from prosecution for warlike acts. If one is dealing with a group like the PLO, elements of which often use terrorist tactics, this distinction becomes very important. Treating these terrorists as soldiers also enhances their stature, to the detriment of the civilized world community.

These problems are compounded by Article 44 of Protocol I, which allows irregular fighters to retain combatant and POW rights even though they do not comply with the traditional requirement of distinguishing themselves from the civilian population by carrying their arms openly and wearing some distinctive sign. (The only exception would be during attacks and military operations preparatory to an attack.) This provision would make it easier for irregulars to operate, and it would substantially increase the risks to the civilian population. Inevitably, regular forces would treat civilians more harshly and with less restraint if they believed that their opponents were free to pose as civilians while retaining their right to act as combatants and their POW status if captured. Innocent civilians would therefore be made more vulnerable by application of the Protocol. This is no advance for humanitarian law.

In addition, the Protocol eliminates one of the basic existing requirements that irregular groups must meet to qualify for combatant and POW status: that the group as such generally conduct its operations in accordance with the laws and customs of war. Instead, Protocol I provides that individual members of such groups must be accorded POW benefits (with very limited exceptions) even if the group as such (e.g., the PLO) displays a callous and systematic disregard for the law. This means in effect that liberation groups can enjoy many of the benefits of the law of war without fulfilling its duties, and with the confidence that the belligerent state has no real remedy under the Protocol to deal with this matter.

The experience of the last decade confirms the hypocrisy of the regime established by Article 1(4). Having achieved a political victory by "internationalizing" their own internal conflicts, so-called liberation groups have shown little interest in following through on the obligations of the Protocol. They have not acted in accordance with the existing requirements of customary international law, nor have they even bothered to file declarations with the Swiss Government accepting the obligations of the Protocol (as contemplated in Article 96). They have been content to cite the Protocol (e.g., in the United Nations) for the proposition that they must be accorded the benefits of humanitarian law (e.g., prisoner-of-war status) without fulfilling the duties expected. In practice, they have continued to make indiscriminate attacks on innocent civilians.

The *Journal* article complains that the U.S. decision deprives the world community of a "common framework" and "hinder[s] the development and acceptance of universal standards in a field where they are particularly needed."³ This view fails to take into account the fact that the main problem with the current laws of war is not their substantive adequacy but the lack of

³ Gasser, *supra* note 1, at 924.

observance of even the most basic principles, such as immunity for non-combatants from intentional attack. Sadly, many of those countries or entities demanding new rules appear to have little regard for the existing requirements of international law.

In addition, the charge in the article that the U.S. position is "political" and "partisan" is polemical.⁴ The U.S. position is based on the merits of the Protocols, and our conclusion on whether they advance humanitarian law. From the standpoint of the United States, it is not sufficient that Protocol I was the product of enormous negotiating efforts over many years and that many countries have and will become a party. The approval of the United States should never be taken for granted, especially when an agreement deals with national security, the conduct of military operations and the protection of victims of war.

Finally, as the President stated in his transmittal letter, we must not, and need not, give recognition and protection to terrorist groups as the price for progress in humanitarian law. Article 1(4) of Protocol I creates "an unacceptable and thoroughly distasteful price"⁵ for adherence. The United States is not willing to acquiesce in such a regime.

ABRAHAM D. SOFAER*

⁴ *Id.*

⁵ *Letter of Transmittal, supra* note 2, at 911.

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NOTES AND COMMENTS

PERESTROIKA AND INTERNATIONAL LAW

Soviet positions on international law and organizations are changing sharply under the influence of the policy of *perestroika* (restructuring) introduced by General Secretary M. S. Gorbachev. This development was brought to the attention of the American Society of International Law at its Annual Meeting in April 1988 by the noted Soviet international lawyer, G. I. Tunkin.¹

Considering the dismissive attitude toward international law of the Soviet Union in its early years, the magnitude of the change is impressive. Stressing "the primacy of international law in politics,"² Gorbachev has initiated Soviet payment of back dues to the United Nations, encouragement of universal acceptance of the compulsory jurisdiction of the International Court of Justice, espousal of customary international law as "general international law" to be respected by all countries, and application by the USSR for observer status in the General Agreement on Tariffs and Trade (GATT); and he has even hinted that Soviet participation in the International Monetary Fund would be appropriate. One cannot but ask whether Soviet policymakers have turned the page to a new chapter in the history of Soviet attitudes toward international law and institutions. To find the answer, the new attitudes must be seen against the background of previous Soviet views, in particular, those that began to evolve in the 1950s.

CLASS STRUGGLE

Gorbachev describes early Soviet foreign policy as having aimed at creating conditions for the "construction of a new society in the country of the socialist revolution." Foreign policy, in his view, represented "a continuation of the class politics of the victorious proletariat."³ Soviet analysts interpreted international law in those years as a reflection of the will of the ruling classes of states. Socialist states and capitalist states each produced a set of international legal norms.⁴ "General" international law was formed by the

¹ Tunkin, Address at the Annual Meeting of the American Society of International Law, Washington, D.C. (Apr. 21, 1988). The references cited hereinafter are based on a tape recording of the Address.

² Gorbachev, *Real'nost' i garantii bezopasnogo mira* (Reality and Guarantees of a Secure World), Pravda, Sept. 17, 1987, at 1, col. 1, 2, col. 3. Translations from Russian-language sources are the author's.

³ Gorbachev, *Oktiabr' i perestroika: revoliutsiia prodolzhaetsia* (October and Perestroika: The Revolution Continues), Izvestiia, Nov. 3, 1987, at 2, col. 1, 4, col. 3 (report to joint session of Central Committee of CPSU, Supreme Soviet of USSR, Supreme Soviet of RSFSR, 70th anniversary of October revolution).

⁴ Kulski, *The Soviet Interpretation of International Law*, 49 AJIL 518, 518-23 (1955).

coincidence of norms from the two sets.⁵ Class struggle, however, prevailed; international law was to be used by the USSR as part of that struggle.⁶

PEACEFUL COEXISTENCE EMERGES AS A LEGAL DOCTRINE

In the 1950s, Soviet attitudes began to change. The Government formulated the theory of peaceful coexistence, which minimized the role of class struggle between socialist and capitalist states and stressed the element of cooperation.⁷ This departure did not find favor with China, which criticized peaceful coexistence as "revisionist" for postulating the possibility of cooperation.⁸

Nevertheless, the theory of peaceful coexistence continued to be refined in the Soviet Union and was applied by Tunkin to international law. Taking peaceful coexistence as the basis for international legal relations,⁹ he argued that while socialist and capitalist states had different ideas about international legal norms, they could agree upon certain norms that he saw as forming a single body of international law. The agreement might be explicit (treaties) or tacit (customary law).¹⁰ Tunkin thus rejected the prior theory of two separate bodies of international law for the socialist and capitalist states. His thesis provided a "theoretical foundation for the common legal system of the entire international community"¹¹ and facilitated relations with capitalist states on the basis of international law.¹²

Peaceful coexistence was viewed under this approach as a context in which capitalism and socialism vied with each other. The 1961 version of the Communist Party program characterized peaceful coexistence as "a specific form of the class struggle."¹³ "The characteristic of the contemporary stage of development of international law from the standpoint of its economic base," according to a 1967 text, "is that its development occurs under the influence of two antagonistic systems—the capitalist and the socialist. Peaceful coexistence of states of these two opposing systems defines, in general, the level of development of general international law at this stage."¹⁴

⁵ Quigley, *The New Soviet Approach to International Law*, 7 HARV. INT'L L.J. 1, 2-4 (1965).

⁶ Hazard, *Pashukanis Is No Traitor*, 51 AJIL 385, 387 (1957).

⁷ Quigley, *supra* note 5, at 8.

⁸ Chiu, *Communist China's Attitude Toward International Law*, 60 AJIL 245, 245-46 (1966).

⁹ Tunkin, *Co-Existence and International Law*, 95 RECUEIL DES COURS 1 (1958 III); Hazard, *Soviet Socialism as a Public Order System*, 53 ASIL PROC. 30, 33-34 (1959).

¹⁰ Quigley, *supra* note 5, at 4-5.

¹¹ K. GRZYBOWSKI, *SOVIET PUBLIC INTERNATIONAL LAW: DOCTRINES AND DIPLOMATIC PRACTICE* 10-22 (1970).

¹² McWhinney, *Changing International Law Method and Objectives in the Era of the Soviet-Western Détente*, 59 AJIL 1, 3 (1965); E. MCWHINNEY, *THE INTERNATIONAL LAW OF DÉTENTE* 27 (1978) [hereinafter E. MCWHINNEY, *DÉTENTE*].

¹³ PROGRAMMA I USTAV KOMMUNISTICHESKOI PARTII SOVETSKOGO SOIUZA (Program and Charter of the Communist Party of the Soviet Union) 101 (1964) (adopted at 22d Party Congress, 1961) [hereinafter PROGRAM]. This concept of peaceful coexistence is attributed to the Cold War by Evgenii Primakov, Director of the Institute of International Relations. *In the Same Boat*, NEW TIMES, No. 42, 1987, at 14, 15 (interview of Primakov).

¹⁴ 1 KURS MEZHDUNARODNOGO PRAVA (Course in International Law) 31 (F. I. Kozhevnikov et al. eds. 1967).

Tunkin's position led to formulation of a law of peaceful coexistence during a decade and a half of détente with capitalist states.¹⁵ Soviet scholars said that peaceful coexistence involved respect for sovereignty, nonaggression, noninterference in internal affairs and equality of states.¹⁶ The USSR proposed codification of these concepts, resulting in the adoption by the United Nations General Assembly of the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.¹⁷ Soviet theorists saw the USSR as having achieved an international posture that permitted it to play a significant role in the development of international law; international law was losing its capitalist character.¹⁸

Peaceful coexistence was not viewed as static. "At one period it can significantly differ from peaceful coexistence at another period of development of international relations, both from the standpoint of its breadth and depth of collaboration and as regards its certainty." Peaceful coexistence as of 1967 was said to be "significantly different from the peaceful coexistence that existed before World War II."¹⁹

GORBACHEV'S "NEW THINKING" ON PEACEFUL COEXISTENCE

Gorbachev now moves Tunkin's position on peaceful coexistence a bit further by minimizing the aspect of class struggle and stressing the aspect of cooperation. Peaceful coexistence, he has said, "changed into a condition for the survival of all humanity." He characterizes the world as having become increasingly interdependent through "internationalization of economic connections," the technological revolution and the "qualitatively new role of the media." Greater cooperation is necessitated by problems of a worldwide order such as the increasing scarcity of resources, "ecological danger," the "crying social problems of the developing world" and, most important, nuclear weapons, which place humanity's survival "in doubt."²⁰

The earlier formulation of peaceful coexistence as "the class struggle in the international arena" is now criticized on the grounds that it "does not reflect the actual meaning of the principle. It is a principle of interstate relations that should not be turned into an arena for class struggle."²¹ At its

¹⁵ E. McWHINNEY, *DÉTENTE*, *supra* note 12, at 1-5, 23.

¹⁶ McWhinney, "Peaceful Co-Existence" and *Soviet-Western International Law*, 56 AJIL 951, 954 (1962); E. McWHINNEY, *DÉTENTE*, *supra* note 12, at 7.

¹⁷ GA Res. 2625, 25 UN GAOR Supp. (No. 28) at 121, UN Doc. A/8028 (1971); E. McWHINNEY, *DÉTENTE*, *supra* note 12, at 23; Hazard, *Codifying Peaceful Co-Existence*, 55 AJIL 109 (1961); Hazard, *Co-Existence Codification Reconsidered*, 57 AJIL 88 (1963); Hazard, *New Personalities to Create New Law*, 58 AJIL 952 (1964); Hazard, *Co-Existence Law Bows Out*, 59 AJIL 59 (1965); Freeman, *Some Aspects of Soviet Influence on International Law*, 62 AJIL 710, 715 (1968).

¹⁸ Crane, *Soviet Attitude Toward International Space Law*, 56 AJIL 685 (1962). Quigley, *supra* note 5, at 14.

¹⁹ Kozhevnikov (ed.), *supra* note 14, at 83-84.

²⁰ Gorbachev, *supra* note 3, at 2, col. 1.

²¹ Vereshchetin & Mullerson, *Novoe myshlenie i mezhdunarodnoe pravo* (The New Thinking and International Law), SOVETSKOE GOSUDARSTVO I PRAVO (Soviet State and Law), No. 3, 1988, at 3, 5.

27th congress in 1986, the Communist Party deleted the characterization of peaceful coexistence as "a specific form of class struggle" from its program.²² "The interests of mankind," Tunkin explained to the American Society of International Law, "must take precedence over national or class interests." Just as the Nazi threat forced the USSR and capitalist states to unite during World War II, so today the nuclear threat forces them to work together to avert war.²³ "What is new," said Tunkin, "is an idea that the primacy of international law in international politics is a precondition of human survival."

WORLD WAR IS NO LONGER INEVITABLE

The traditional Soviet thesis about world war, prior to Khrushchev, was that wars between capitalist states were to be viewed as inevitable. Lenin interpreted World War I as a war between capitalist states vying for raw materials and territory for capital investment: "Capitalism now finds that the old national states are too cramped for it."²⁴

That thesis was modified in 1956, when the Twentieth Party Congress declared that the growth of the socialist camp had made it possible to prevent the outbreak of intercapitalist wars.²⁵ In 1961 the party program stated:

The growing counterweight of the forces of socialism over the forces of imperialism, of the forces of peace over the forces of war, means that even before the full victory of socialism on earth, with capitalism preserved in a part of the earth, there will be a realistic possibility of excising world war from the life of society.²⁶

Gorbachev finds additional factors militating against world war. Since World War II, there has occurred "a modification of the contradictions" that "in the past inexorably led . . . to world wars among the capitalist states."²⁷ "Now," according to Gorbachev, "the situation is different. The lessons of the past war and fear of weakening oneself vis-à-vis socialism, which has become a worldwide system, have not allowed capitalism to take its internal contradictions to the limit." The contradictions have "turned into a technological race."²⁸

²² M. S. GORBACHEV, *PERESTROIKA I NOVOE MYSHLENIE DLIA NASHEI STRANY I DLIA VSEGO MIRA* (Reconstruction and the New Thinking for Our Country and for the Whole World) 150 (1987); PROGRAM, *supra* note 13, at 101; *Programma Kommunisticheskoi Partii Sovetskogo Soiuza: Novaia redaktsiia, priniata XXVII s'ezdom KPSS* (Program of the Communist Party of the Soviet Union: New Edition, adopted by the XXVII Congress of the CPSU), Pravda, Mar. 7, 1986, at 3, 7.

²³ M. S. GORBACHEV, *supra* note 22, at 150.

²⁴ Lenin, *Socialism and War* (1915), in *THE LENIN ANTHOLOGY* 183, 185-86 (R. Tucker ed. 1975).

²⁵ M. S. GORBACHEV, *supra* note 22, at 147; Hazard, *supra* note 6, at 388.

²⁶ PROGRAM, *supra* note 13, at 99.

²⁷ Gorbachev, *supra* note 3, at 4, col. 4.

²⁸ *Id.*

The possibility of peace is enhanced, in Gorbachev's view, by the fact that capitalist states can develop economically "without militarization." Gorbachev cites the "'economic miracle' in Japan, West Germany, and Italy. . . . The period of rapid development of the contemporary capitalist economy in a number of countries occurred with minimal military expenditures." In the United States after World War II, the economy "relied on militarism. At first, this stimulated it." But then, "this waste of resources turned into an astronomical state debt."²⁹

Capitalist states still need the markets and resources of the Third World, where they have traditionally fought wars for control, but now the Third World is demanding a "New International Economic Order" to end unequal exchange with the developed world. Thus, "in this realm as well, the contradictions are undergoing modification."³⁰ Some Third World countries, "while maintaining features of underdevelopment, are approaching the level of the great powers in the world economy."³¹ This growth will lead to a more secure world.

In addition, says Gorbachev, as a result of the restructuring of its economy, the Soviet Union will substantially increase its foreign trade. Its "scientific, technical and productive potential will become a qualitatively more significant part of the world economy. And this in a decisive way will broaden and strengthen the material base of an all-encompassing system of peace and international security."³²

A final factor working toward world peace is the emergence in capitalist states since World War II of citizen movements in opposition to nuclear armaments, pollution, racial discrimination and poverty. Left-of-center political parties—socialist, social democrat and laborite—have also opposed militarism.³³ "The antiwar movement has become an influential factor in international life."³⁴

WAR AND DEVELOPMENT

According to Anatolii Dobrynin, former Soviet ambassador to the United States, a "basic change in world social development" is that capitalism "has shown a much greater capacity for durability than was earlier imagined." This observation applies not only to developed, but also to Third World countries. Referring to the latter, Dobrynin said that the need now is for "a struggle for the path of progressive democratic development under the conditions of capitalism," relying on a broader social base than formerly.³⁵ From the point of view of the working class, Dobrynin claimed, this new strategy was justified because workers suffer most of all from the arms race, regional wars and failure to improve "North-South" economic relations.³⁶

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 5, col. 1.

³² *Id.* at 4, col. 4.

³³ *Id.* at 5, col. 2.

³⁴ M. S. GORBACHEV, A TIME FOR PEACE 26 (1985).

³⁵ *Soveshchanie v Prage* (Meeting in Prague), Pravda, Apr. 13, 1988, at 4, col. 4 (speech of Dobrynin at meeting of Communist parties).

³⁶ *Id.* at 4, col. 5.

To achieve social change, Dobrynin stressed setting a good example. He said that, so far, socialism has not done this well: "Socialism at the present stage of its development has not fully manifested its advantages. It has not yet set; for the people of the West, a convincing example of thorough democratization of society and of radical, thorough-going resolution of economic problems." Then, in an apparent reference to Stalinism, he conceded that "[t]here have also been negative phenomena in the development of many socialist countries, beginning with ours. As a result, the attracting force of socialism was weakened."

This strategy places little emphasis on armed force. It seems to leave only a minor role for anticolonial wars (wars of national liberation). Dobrynin stated that "many Communist parties have already concluded that . . . it is necessary to follow a peaceful path of social reforms." Force, he said, is appropriate only as a countermeasure: "Interference by imperialism, force from rightist forces . . . may give rise to responsive—and fully justified—actions, including armed actions, by revolutionary forces." But he went on to ask: "How can one limit such a conflict within national bounds and not let it turn into a new kindling point of international tension?" Such force must be kept to a minimum because "social progress . . . is now possible only in conditions of international peace, only by observing the right of each nation to free determination of its fate, without outside interference."³⁷

As for Gorbachev, he has asserted that peace is a condition for economic reform in the USSR. "Yes," he wrote, "we are interested in normal international conditions for our internal progress."³⁸ To achieve economic reform, the Soviet Union needs to reduce its military budget and commitments.³⁹ A desire for increased foreign trade is doubtless another factor.⁴⁰

SOVIET-U.S. RELATIONS

Gorbachev believes that the antagonism between the United States and the Soviet Union has diminished in significance. He sees a "gradual, yet increasingly apparent, loss by the United States of its former economic and political domination and the erosion of its positions as compared with the new 'centers of force,' primarily Western Europe and Japan."⁴¹ In addition, he finds that the Third World is increasingly independent politically of the United States.⁴²

Gorbachev says that some U.S. officials and analysts regard hostility as "normal" and "view confrontation as almost natural." But "confrontation is not an innate defect in our relations; it is an anomaly. It is not inevitable that it should be maintained."⁴³ Now peaceful coexistence is seen as having

³⁷ *Id.*

³⁸ M. S. GORBACHEV, *supra* note 22, at 5.

³⁹ Lebahn, *Political and Economic Effects of Perestroika on the Soviet Union and its Relations to Eastern Europe and the West*, 39 *AUSSENPOLITIK* 107, 107-11 (1988).

⁴⁰ Grzybowski, *Soviet Theory of International Law for the Seventies*, 77 *AJIL* 862 (1983).

⁴¹ M. S. GORBACHEV, *supra* note 34, at 32.

⁴² M. S. GORBACHEV, *supra* note 22, at 186.

⁴³ M. S. GORBACHEV, *supra* note 34, at 67. *See also id.* at 87 ("There is no fatal inevitability of confrontation between the two countries").

entered an even more collaborative stage. As the aspect of class struggle declines, collaboration becomes "the most important component of the principle" of peaceful coexistence.⁴⁴ The former view of peaceful coexistence, according to Central Committee member V. A. Medvedev, was that the capitalist and socialist states moved "on parallel rails." That view he calls "an illusion. The interdependence of the world is such that these parallels inevitably will intersect." The two types of states "will interact closely" in "scientific-technical, economic and social spheres, in human relations and in solving global problems."⁴⁵

INCREASED RELIANCE ON THE UNITED NATIONS

From the increasing role of cooperation and the decreasing role of class struggle emerges a greater role for international law. The primacy of international law to which Gorbachev alludes "is a normative expression of the priority of general human values and interests."⁴⁶

One area of initiative in international law is the role of the United Nations. Tunkin told the Society that while "world government is unattainable in the foreseeable future," there is a need for "effective international mechanisms of solving international problems and enforcing international law."

In a long public letter to the United Nations on the occasion of the opening of the General Assembly session in September 1987, Gorbachev called for increased reliance on the Organization. He suggested the creation of a United Nations mechanism to monitor arms limitation agreements, crisis situations and military preparations that might lead to aggression. He proposed that military observers be used more widely to contain conflicts. The permanent members of the Security Council should take particular responsibility for preventing regional wars and should themselves abstain from involvement, which, he said, is "one of the factors that fan regional conflicts."⁴⁷

Gorbachev's letter advanced various other proposals. A tribunal should be established under United Nations auspices to investigate acts of international terrorism. The United Nations should take stronger measures to end apartheid, a "destabilizing factor" in international relations, and to implement the New International Economic Order, since a world suffering from starvation cannot be secure. To allow Third World states to improve their economies, their debt payments should be limited to a percentage of annual export earnings, and protectionist barriers of developed states should be eliminated.⁴⁸ "Ecological security" should be promoted by a system of annual reports to the United Nations on antipollution efforts.⁴⁹ A consulta-

⁴⁴ Vereshchetin & Miullerson, *supra* note 21, at 5.

⁴⁵ V. A. Medvedev, *paraphrased in Velikii oktiabr' i sovremennyyi mir* (Great October and the Contemporary World), *Izvestiia*, Dec. 10, 1987, at 5, col. 6.

⁴⁶ Vereshchetin & Miullerson, *supra* note 21, at 3.

⁴⁷ Gorbachev, *supra* note 2, at 2, col. 1. See also Vereshchetin & Miullerson, *supra* note 21, at 7.

⁴⁸ Gorbachev, *supra* note 2, at 2, col. 1.

⁴⁹ *Id.* at 2, col. 2.

tive council of leading intellectuals should be created to advise the United Nations.⁵⁰

In his address, Tunkin referred to a General Assembly resolution proposed in 1986 by the USSR and nine other socialist states entitled "Establishment of a Comprehensive System of International Peace and Security." The resolution called for a strengthening of United Nations processes and was supported by most Third World states, while most Western states abstained.⁵¹ The resolution reflected ideas the USSR had presented to the Secretary-General in a memorandum on the development of international law. The memorandum stated that "international law . . . must go to an even higher level. It must become a *law of comprehensive security and collective State responsibility towards mankind*. The primary responsibility is to deliver the human race from the impending threat of nuclear annihilation." The memorandum called for an "obligation on the part of nuclear Powers to renounce the possession of nuclear weapons and any other weapons of mass destruction, on the basis of agreements on their total elimination." It also called for a greater role in the international system for non-nuclear states and renunciation of "spheres of vital interests" and "spheres of influence," concepts that it said were responsible for "subjugation and enslavement."⁵²

In contrast to the USSR's traditional wariness of international adjudication,⁵³ Gorbachev urges greater use of the International Court of Justice. He recommends that all states recognize the compulsory jurisdiction of the Court under the optional clause. A set of criteria for the acceptance of that jurisdiction should be developed, and the permanent members of the Security Council should take the lead in doing so. More frequent requests for ICJ advisory opinions should be made by the General Assembly and the Security Council.⁵⁴ This view of the Court, which Tunkin characterized as new, is more favorable than that expressed in recent Soviet scholarship.⁵⁵ The Soviet Union has also indicated an intent to apply for membership in the International Monetary Fund and the GATT.⁵⁶

Formerly, the Soviet approach to the creation of norms in international law tended toward positivism, a readiness to accept only that to which agreement was manifested.⁵⁷ This practice limited the creation of customary norms.⁵⁸ Now, however, the positivist approach appears to be softening.

⁵⁰ *Id.* at 2, col. 4.

⁵¹ GA Res 41/92 (Dec. 4, 1986). Vote: 102-2-46 (France and the United States in the negative).

⁵² Letter to the Secretary-General from the Deputy Minister for Foreign Affairs and Deputy Head of the delegation of the Union of Soviet Socialist Republics to the forty-first session of the General Assembly, Nov. 24, 1986, UN Doc. A/C.6/41/5 (1986) (emphasis in original).

⁵³ Zile, *A Soviet Contribution to International Adjudication: Professor Krylov's Jurisprudential Legacy*, 58 AJIL 359, 364-66 (1964).

⁵⁴ Gorbachev, *supra* note 2, at 2, col. 3.

⁵⁵ See, e.g., M. L. ENTIN, *MEZHDUNARODNYE SUDEBnye UCHREZHDENIYA* (International Judicial Institutions) (1984), reviewed in 82 AJIL 396 (1988) (by Richard Szawlowski).

⁵⁶ Tran, *Breaking into the Bank*, SOUTH, May 1988, at 13.

⁵⁷ INTERNATIONAL LAW 61-62 (G. I. Tunkin ed. 1986).

⁵⁸ Quigley, *supra* note 5, at 15-16.

Gorbachev advocates recognition of consensus resolutions of the General Assembly as "morally and politically binding."⁵⁹ In addition, the Soviets suggest that nongovernmental organizations be given a greater role in the United Nations.⁶⁰ They also claim that final acts of international conferences can create norms if they contain postulates that the parties intend to be normative.⁶¹

ASSESSMENT

The most concrete manifestation of the "new thinking" has been the radical Soviet suggestions for arms reduction, reflected in the 1987 intermediate nuclear force treaty⁶² and in negotiations for a 50 percent reduction in long-range nuclear weapons.⁶³ Détente brought arms control. The new thinking has brought arms reduction. While this approach would seem to apply to the full range of international law issues, doctrinal positions have yet to be formulated. Consequently, the new thinking remains a framework. It is unclear what impact it may have on such matters as, for example, the Brezhnev doctrine.⁶⁴

The ultimate impact of the new thinking on international relations will depend on the reaction of other states and on the future of the *perestroika* policy within the USSR. The reaction of the United States has been one of skepticism.⁶⁵ The Department of State says that the new thinking is "a set of tactical maneuvers designed to court world public opinion, throw rivals off balance, and gain the diplomatic high ground in Third World issues."⁶⁶

The new thinking is probably more serious than that. The USSR is likely to continue to desire external calm for domestic economic reform. Promotion of the United Nations reflects the increasing support for Soviet views there and the increasing isolation of the United States. That situation is not

⁵⁹ Gorbachev, *supra* note 2, at 2, col. 4.

⁶⁰ Vereshchetin & Miullerson, *supra* note 21, at 7; Malinin, *Kontseptsia vseob'emliushchei sistemy mezhdunarodnoi bezopasnosti i mezhdunarodnoe pravo* (The Concept of a Comprehensive System of International Security and International Law), PRAVOVEDENIE, No. 4, 1987, at 16, 21.

⁶¹ Malinin, *supra* note 60, at 24.

⁶² Treaty on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, Dec. 8, 1987, United States-USSR, S. TREATY DOC. NO. 11, 100th Cong., 2d Sess. (1988), DEP'T ST. BULL., No. 2131, February 1988, at 24.

⁶³ DEP'T ST. BULL., No. 2123, June 1987, at 13 (news conference of Secretary of State Shultz, Apr. 15, 1987); *id.*, No. 2131, February 1988, at 6 (address by General Secretary Gorbachev), and at 20 (address by President Reagan).

⁶⁴ *Sovereignty and International Duties of Socialist Countries*, Pravda, Sept. 25, 1968, reprinted in 7 ILM 1323 (1968) (trans. N.Y. Times, Sept. 27, 1968).

⁶⁵ John C. Whitehead, Deputy Secretary of State, *U.S.-Soviet Relations*, DEP'T ST. BULL., No. 2122, May 1987, at 43.

⁶⁶ Michael H. Armacost, Under Secretary of State for Political Affairs, *U.S.-Soviet Relations: Testing Gorbachev's "New Thinking,"* DEP'T ST. BULL., No. 2126, September 1987, at 36, 38. See, to same effect, Weeks, *The Reagan Détente*, GLOBAL AFFAIRS, No. 2, 1988, at 89.

likely to change soon. The Soviets' new assessment of the international situation focuses on significant factors of international relations. The new thinking carries the USSR further in the direction first taken by its adoption of peaceful coexistence in the 1950s. It represents another step in the accommodation between the Soviet revolution and Western capitalism.

JOHN QUIGLEY*

CORRESPONDENCE

TO THE EDITOR IN CHIEF:

August 1, 1988

Judge Schwebel's article (81 AJIL 831 (1987)) directs attention to an interesting new aspect of the internal organization and practice of the Court that is, evidently, gaining in strength and developing its own constitutional customs and conventions in ways not necessarily anticipated by the drafters of the Court's Statute and of the successive revisions of the Rules of Court, but compatible, nevertheless, with the letter or the spirit of those Rules.

The Statute envisages—apart from the special Chamber of five judges to “hear and determine cases by summary procedure” allowed under Article 29—the creation of special Chambers “composed of three or more judges as the Court may determine, for dealing with particular categories of cases,” here indicating, specifically, “labour cases and cases relating to transit and communications” (Article 26(1)). Judge Lachs, in reviewing the historical origins of the institution of special Chambers, going back to the old Permanent Court and to the Treaty of Versailles and, particularly, its Articles 336 and 376, and the provisions of the Peace Treaties dealing with questions of navigation, transit and communications, has made the case for *functional* specialization within the Court through the Chamber system, as a means of mobilizing specialist expertise.¹ One such functionally specialized panel suggested by Judge Lachs would have been devoted to the protection of the environment, particularly as to pollution of rivers and lakes on borders between states, and another to the law of the sea. If the statutory provision for special Chambers had been picked up, earlier, by the Court, and used in its original, functionally specialized intent, this might have headed off the current tendency, in recourse to the judicial process as a means of international third-party dispute settlement, to create international tribunals parallel to the International Court of Justice, specialized by subject matter, like the one provided by the Third United Nations Conference on the Law of the Sea in its Final Act. Judge Lachs seems right, in this regard, to signal the problems for the organic unity of international law posed by any such separate and autonomous, and potentially competing, international tribunals.²

* Professor of Law, Ohio State University. The author is indebted to Gordon Livermore, Associate Editor, *Current Digest of the Soviet Press*, Columbus, Ohio, for reference to recent statements by Soviet officials.

¹ Lachs, *The Revised Procedure of the International Court of Justice*, in *ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER* 21, 42 (Kalshoven, Kuyper & Lammers eds. 1980).

² *Id.* at 44.

The public debate surrounding the first special Chamber created by the Court, for the *Gulf of Maine* case,³ has concerned the degree of deference to be accorded by the Court to the preferences of the parties as to the choice of the "three or more judges," from among the regular 15-member plenum of the Court, to make up the panel. The Court's Statute, by itself, appears conclusive: it is the "number of judges to constitute such a chamber" that the plenum of the Court is to determine "with the approval of the parties" (Article 26(2)). It is the Rules of Court that, *ex hypothesi*, could not overcome the language of the Statute; in their 1972 version and, again, in the 1978 revised version, the Rules introduce a new element of ambiguity. Article 26(1) of the 1972 Rules required the President of the Court to consult with the parties regarding the "composition of the Chamber"—this in addition to the requirement in Article 26(2) of the same Rules, which repeated the provision of Article 26(2) of the Statute as to the Court's determining the "number" of judges with the approval of the parties. Article 17(2) of the present, 1978, revised Rules of Court states the requirement under the previous Article 26(2) a little more strongly, perhaps, with its stipulation that "[w]hen the parties have agreed, the President shall ascertain their views regarding the composition of the Chamber, and shall report to the Court accordingly."

It is known—from the Institut de Droit International reunion in Dijon in August 1981—that the special Chamber originally proposed would not have been limited in its membership to Western Europe and North America, but would have been broadly representative in terms of both the principal legal systems of the world and the main political-geographic regions, and that its members would also have had a high degree of functional (law of the sea) specialization. In addition, it would *not* have included judges of the same nationalities as the two parties—a principle that carries extra weight if the Chamber is to be limited to five judges, and that seems only partly explained, in its application in the specific *Gulf of Maine* context, by U.S. Judge Richard Baxter's recusing of himself. After President Waldock's sudden death in the late summer of 1981, it was left to the then Acting President, Judge Elias, to conclude the arrangements for the panel for *Gulf of Maine*, for presentation for approval by the plenum of the Court. The task was further complicated, not merely by the fact that President Waldock would himself have presided over the special Chamber, but also by the sudden death of the distinguished Danish jurist, Professor Sørensen (not a member of the International Court), who had already agreed to serve on the Chamber.

The debate within the Court itself over the constitution of this Chamber—reflected not merely in the dissenting opinions of Judges Morozov and El-Khani, cited in Judge Schwebel's article, but also in Judge Oda's declaration accompanying the Court's Order⁴—seems to have assisted in the long-range dialectical development of the Court's own thinking: first, as to how much, if at all, to defer to the wishes of the parties on the choice of judges; and, second, as to how far it is an imperative of the constitution and practice of the Court today for it to be seen as broadly representative, in legal-sys-

³ Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), Constitution of Chamber, 1982 ICJ REP. 3 (Order of Jan. 20).

⁴ *Id.* at 10.

temic and political-geographical terms, both in its decision making and in its opinion writing in support of decision. If the *Gulf of Maine* panel, as finally constituted, may be viewed by many as having been narrowly Eurocentrist in character and composition since limited, in its five judges, to Western European and North American jurists, every special Chamber constituted by the Court thereafter has been determinedly eclectic in legal-systemic terms, and immune, in consequence, from any political reproaches of "Eurocentrism" (i.e., Western Europe and, by extension, North America). Moreover, in the aftermath of *Gulf of Maine*, even where, as with the *Guinée/Guinée-Bissau* arbitration,⁵ the parties have opted for a special arbitral tribunal rather than the International Court, and consequently have acted with absolutely no legal restrictions on their choice of members, they have restricted that choice to serving judges of the International Court of Justice and made sure that the membership represented various legal systems.

The preferred constitutional position would be for Article 26(2) of the Statute and Article 17(2) of the 1978 Rules to be interpreted as instituting a full consultation by the Court with the parties as part of the process of constituting special Chambers, and a pragmatic consensus between the Court and the parties that a broadly eclectic membership including respect for political-geographical representativeness is imperative. The *Gulf of Maine* experience, imperfect as it may have been, would thus be seen as part of a trial-and-error testing experience of which the present Court is the beneficiary.

Incidentally, the proposition advanced by Judge Schwebel in regard to the final Judgment in *Gulf of Maine*,⁶ that it was not in fact (whatever the legal-cultural homogeneity of its members) narrowly Eurocentrist in its holding or in its supporting reasoning, should be augmented by a further one. The advantages of special panels or senates or chambers, specialist in terms of subject matter, within a larger tribunal, are sufficiently well-known and proven in the experience of continental European and European-influenced courts for the International Court's current experience with Chambers to continue to be useful and to be extended; and there is enough acquired experience, in continental European and European-influenced courts and also within the International Court itself, to guard against the political risks inherent in any system of selecting some judges, rather than others, from the full ranks of the Court.

It is, however, especially important in this regard that the opting for a special Chamber not be viewed as a convenient method by the states parties to a case of avoiding or bypassing the jurisdiction of the full Court, characterized as "political" for the purpose. Some public comments by the State Department in the aftermath of the earlier *Nicaragua* judgments⁷ did seem

⁵ Tribunal arbitral pour la délimitation de la frontière maritime Guinée/Guinée-Bissau (Award of Feb. 14, 1985).

⁶ Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 ICJ REP. 246 (Judgment of Oct. 12).

⁷ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Declaration of Intervention, 1984 ICJ REP. 215 (Order of Oct. 4).

to imply such justifications for recourse to Chambers.⁸ In contrast, nothing in the Canadian Government's public statements—either of the Trudeau Government, which agreed to the Chamber in *Gulf of Maine*, or of the successor Mulroney Government—derogates from long-standing policies of support for the International Court of Justice in its normal full jurisdiction as a prime means of international dispute settlement.

EDWARD MCWHINNEY*

TO THE EDITOR IN CHIEF:

July 18, 1988

Professor Barrie's arguments that the ASIL policy on divestment violates international law (82 AJIL 311 (1988)) are erroneous, for reasons going beyond Paul Szasz's excellent responding Comment (*id.* at 314). As the author of the underlying Note on the Society's divestment decision (81 AJIL 744 (1987)), and also as one who, like Professor Barrie, makes his daily bread teaching international law, I add a few words in reply.

In citing Chief Buthelezi's aphorism against burning down a house to rid it of a snake, Professor Barrie is too kind to both the snake and the house. An apter reference would have been to the historical necessity in many parts of East and southern Africa to burn down village huts and sometimes even whole villages to rid them of driver ants. This reflects the nature of apartheid to black, and increasingly to white, South Africans, not as a single creature but a deadly scourge of racism made pervasive by the Pretoria regime. All participants are obliged under the Convention on the Suppression and Punishment of the Crime of Apartheid (Annex to GA Resolution 3068 (XXVIII) of November 30, 1973) to help rid the international community of this crime, as apartheid is now defined by international law.

It was a recognition of "law," including obligations to desist from being either a joint tortfeasor or an accessory to a crime, that helped produce the ASIL decision to desist from taking steps economically or symbolically to cooperate with or lend support to a governmental system that is both illegal and criminal under international law.

As Szasz well states, the principle of domestic jurisdiction is no longer a bar to the international scrutiny of human rights violations (82 AJIL at 317). Moreover, that principle's underpinning doctrine of sovereignty is no longer a bar to individual state action, provided that action is consonant with the United Nations Charter and other major global community policies, in response to massive human rights violations. This permissibility arguably extends to all participants under international law, including learned societies.

The illegality of apartheid and the obligation of states to act against it derive directly from the UN Charter. Thus, all General Assembly resolutions, such as those cited by both Barrie and Szasz, are governed, regarding

⁸ See, e.g., Statement of Department of State on U.S. Withdrawal from Nicaragua Proceedings, Jan. 18, 1985, reprinted in part in *Contemporary Practice of the United States*, 79 AJIL 438, 441 (1985).

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issues relating to apartheid, by authoritative interpretations of the Charter, including its Purposes and Principles. These interpretations, as regards the rights of black South Africans and permissible means of implementing them, have been, and are being, spelled out in a considerable body of General Assembly and Security Council resolutions specifically pertaining to South Africa and apartheid. South Africa is not a "normal" state entitled to enjoy "normal" discretionary internal actions of sovereignty, including the weighing under Article 29 of the Universal Declaration of Human Rights of the rights of its citizens as against their duties to the state. Decisions about the rights and duties of black South Africans have rightfully become the intense concern of the entire international community.

Further, the legality of economic pressure by one state against another is not limited to instances of self-defense and reprisal. Rather, economic pressure is encompassed within and permitted by the duty of all states to respond to the commission of an international crime by a regime, to respond to a system of government that is per se illegal under the Charter and international law, and illegitimate in its utter alienation from and brutality toward the great majority of its citizens. The duty to apply economic pressure has arisen as a consequence of the continuous actions and expectations under the Charter and other law of the international community condemning apartheid over the past 40 years. This duty exists notwithstanding the lack, as yet, of a Security Council resolution imposing economic sanctions. It would exist toward any state to which the global response in law and fact had been the equivalent, regarding duration of time and focus of objective, to that toward South Africa for its policy of apartheid. Its existence, accordingly, cannot be dismissed by invoking the illegality of random self-help economic measures of national policy convenience. A separate issue would be raised, however, if an outside state proposed to use military force under non-self-defense circumstances, absent appropriate authorization by the United Nations.

The recent reimposition of a state of emergency by Pretoria, long condemned as contrary to law and basic rights; its recent announcements of new plans to enforce the Group Areas Act more effectively; and the suppression of Nelson Mandela's birthday celebrations only, sadly, confirm the entire appropriateness of the duty to apply economic pressure in this case.

HENRY J. RICHARDSON III*

TO THE EDITOR IN CHIEF:

April 26, 1988

It may be that some of your readers would have preferred it if the comment on *Taking Treaties Seriously* (82 AJIL 67 (1988)) had appeared after the decision of the arbitration tribunal to be set up in accordance with the International Court of Justice's ruling on the United Nations request for an advisory opinion, for it may be that even that tribunal would not agree with your suggestions.

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Of course treaties must be and, I believe, are taken seriously, but only in respect of what they are providing for. The effect of a treaty, as you know better than most, depends on "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"—to repeat the extraordinary tautology in Article 31 of the Vienna Convention. From this point of view it is difficult to see how the closure of a mission can impede the transit of "persons" to or from the United Nations. The "persons" do not need a mission to enjoy unimpeded transit to or from the United Nations. Transit from or to a mission is a different matter not covered, apparently, by the Headquarters Agreement. The "persons" can stay, e.g., in a hotel from which they can transit to and to which they can transit from the United Nations. In other words the provision in the Headquarters Agreement to which you refer is concerned with the movement of "persons" to or from the United Nations; it has no bearing upon any other place of departure or destination or, indeed, the situation, accessibility or privileges of a mission.

Messrs. Lillich and Weston (82 AJIL 69 (1988)) similarly neglect the nature, scope, "object and purpose" of a treaty, when they repeat their often proclaimed view that so-called lump sum agreements may be relevant to the problem of the amount of compensation, in particular its justness. The suggestion that if I have to assess the "just" amount of compensation I should look to the amount extracted, frequently years after the event, from an impecunious or obstreperous debtor is untenable. It is submitted that the true standard is supplied by the three hundred treaties or so concerning the promotion and reciprocal protection of investments, which were concluded in the course of the last 30 years. The 34 treaties of this kind to which the United Kingdom is a party frequently speak of "just," sometimes of "prompt, adequate and effective," and in the case of China of "reasonable compensation." Whether it is just, adequate or reasonable, the term is invariably defined: compensation "shall amount to the market value [in the case of China "the real value"] of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge, shall include interest at a normal commercial rate until the date of payment, shall be made without delay and shall be effectively realizable and freely transferable." Can it really be said that such clauses leave room for treating the fractions usually payable under lump sum agreements as providing the true or even a relevant standard sanctioned by customary international law?

Messrs. Lillich and Weston list the Agreement between the United Kingdom and China of June 5, 1987, concerning the Settlement of Mutual Historical Property Claims (Cm. 198). They do not list the treaty between the same states of May 15, 1986, concerning the Promotion and Reciprocal Protection of Investments (Cmd. 9821). What possible bearing can the former Agreement have on the construction of the terms "reasonable compensation" in Article 5 of the latter Agreement or on the term "just compensation" in customary international law? Treaties should indeed be taken seriously.

F. A. MANN

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN NASH LEICH*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

INTERNATIONAL ORGANIZATIONS

(U.S. *Digest*, Ch. 2, §4.B)

Expulsion of Nicaragua's Permanent Representative to OAS

Following the expulsion on July 11, 1988, of the American Ambassador to Nicaragua, Richard Melton, and seven other members of the American Embassy at Managua, President Reagan ordered the departure of the Nicaraguan Ambassador to the United States, Dr. Carlos Tunnermann, and seven other Nicaraguan Embassy members. Ambassador Tunnermann was accredited, also, to the Organization of American States as the Permanent Representative of Nicaragua, and one of the other Embassy members, Major Pedro Sampson, Military Attaché, was accredited as Adviser to the Permanent Mission of Nicaragua to the Organization of American States.

On July 12, 1988, Under Secretary of State Michael Armacost summoned Ambassador Tunnermann to inform him that his activities and actions and those of Major Sampson constituted abuse of their privilege of residence in the United States and that their presence was no longer acceptable.¹ The

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¹ Article 3 of the Agreement between the United States of America and the Organization of American States, Relating to Privileges and Immunities, Mar. 20, 1975, 26 UST 1025, 1027-28, TIAS No. 8089, reads:

In case of abuse of the privileges of residence in the United States by any person enjoying diplomatic privileges and immunities under the foregoing articles, the said privileges and immunities shall not be construed to grant exemption from the laws and regulations of the United States regarding the continued residence of aliens. However, no such person shall be required to leave the country otherwise than in accordance with the customary procedure applicable to diplomatic envoys accredited to the Government of the United States.

Authority for the expulsion of Ambassador Tunnermann and Major Sampson also existed under §8 of the International Organizations Immunities Act, 22 U.S.C. §288e(b) (1982).

See further Presidential Power to Expel Diplomatic Personnel from the United States, a memorandum opinion by Asst. Att'y Gen. John M. Harmon, Apr. 4, 1980, 4A OPINIONS OFFICE OF LEGAL COUNSEL 207 (1985). The question had been raised because of the contemplated expulsion of Iranian diplomatic and consular personnel from the United States, which President Carter announced on Apr. 7, 1980, in connection with the breakoff of diplomatic relations between the United States and Iran. See 1980 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 333-35. In regard to the closure on May 6, 1981, of the People's Bureau (Embassy) of the Socialist People's Libyan Arab Jamahiriya, for a "general pattern of

presence of six other named Nicaraguan diplomats accredited to the United States was no longer acceptable, the Under Secretary continued, and the Ambassador must arrange for his own departure and that of the named individuals within 72 hours (i.e., by 5:30 P.M. on July 15, 1988).² On behalf of the Secretary of State, Under Secretary Armacost handed Ambassador Tunnermann two diplomatic notes confirming the United States Government's decision: one in his capacity as Ambassador of Nicaragua to the United States, the other in his capacity as the Permanent Representative of the Republic of Nicaragua to the Organization of American States.³

On the same day, July 12, 1988, Ambassador Richard T. McCormack, the United States Permanent Representative to the Organization of American States, informed it of the U.S. Government's action to expel the two Nicaraguan diplomats, also accredited to the Organization, by identical notes to the Chairman of its Permanent Council, Ambassador Eladio Knipping Victoria, and the Assistant Secretary General in Charge of the General Secretariat, Ambassador Val T. McComie.⁴

A special meeting of the Permanent Council was called on July 14, 1988, at the request of the Permanent Representative of Nicaragua, Ambassador Tunnermann, "for information purposes." In a statement before the meeting that documented the most recent repressive actions by the Nicaraguan Government against its own people,⁵ including its violation of pledges under the Esquipulas II Accord and the Sapoa Agreement,⁶ Ambassador

unacceptable conduct," see *id.* at 326-33. None of the Iranian diplomats in 1980, nor the Libyan diplomats in 1981, were also accredited to an international organization.

On Feb. 11, 1978, the United States expelled the Permanent Representative of the Socialist Republic of Vietnam to the United Nations, Ambassador Dinh Ba Thi, for personal involvement in an espionage conspiracy against the United States. The Ambassador was not accredited to the United States Government, which did not have diplomatic relations with the Socialist Republic of Vietnam. See 1978 *id.* at 119-24.

² In addition to Ambassador Tunnermann and Major Sampson, the persons requested to depart were Manuel Cordero, Minister-Counselor (the second-ranking officer of the Embassy); Orlando Martín Vega Gutiérrez, Counselor; Mrs. Zelmira L. García, Counselor; Mrs. Sofia Clark D'Escoto, First Secretary; Angel R. Arce, Attaché; and Mrs. Maureen Sampson, Attaché.

³ For the notes, see Dept. of State File Nos. P88 0088-2275 and 0088-2274.

⁴ For the text, see *id.*, No. P88 0088-2273.

⁵ Ambassador McCormack discussed the following examples, among others, of repressive Nicaraguan government actions: the shutdown on July 11, 1988, of Radio Católica, for an indefinite period; the suspension the same day of publication of the independent newspaper, *La Prensa*, for 15 days; the police attack on peaceful demonstrators in Nandaime on July 10, 1988, in which 43 were imprisoned, numerous others beaten and four leaders then "sentenced" by the police to 6 months in jail; the murder of Carlos García, a leader of the independent labor confederation, by police after illegally entering his home during the night of July 3, 1988; and threats by Defense Minister Ortega against the lives of the resistance delegation during negotiations under the Sapoa Agreement in June, made in the presence of OAS Secretary General João Clemente Baena Soares and Cardinal Miguel Obando y Bravo, Chairman of the Nicaraguan National Reconciliation Commission and Co-Chairman of the Verification Commission of the Sapoa Agreement. See further OAS Doc. OEA/SER.G, CP/INF.2706/88 (1988).

⁶ The text of the Esquipulas II Accord (the Guatemalan Agreement for Peace in Central America), signed by the Presidents of Costa Rica, Guatemala, El Salvador, Honduras and

McCormack set out the legal basis for the departure of Ambassador Tunnermann and Major Sampson from the United States, in part, as follows:

For the first time in the history of this Organization, the United States, as host country, had reason to invoke its rights under Article 3 of the March 20, 1975 Agreement Relating to Privileges and Immunities between the United States and the Organization of American States, to request the departure of diplomats accredited to the OAS in light of their abuse of their privilege of residence in the United States.

The United States is committed to carrying out its obligations under the Charter as host country to the Organization of American States, its officers and employees and the accredited representatives of its member states. In return, OAS Missions and members of the General Secretariat are obliged not to abuse their privilege of residence through their conduct in the host country.

Certain activities and actions of Ambassador Tunnermann and Major Sampson while serving in a diplomatic mission located in the United States constitute an abuse of their privilege of residence in the United States under the March 20, 1975 Agreement

The Organization of American States can take pride in the fact that the United States has never before had any reason to use its legal authority to take actions against diplomats accredited to the OAS for abuse of their privilege of residence in the United States. Nonetheless, in the rare cases of those who do abuse their privilege of residence, the United States has the legal authority to protect its sovereignty and inherent rights as host country by taking appropriate action, based upon Article 3 of the March 20, 1975 Agreement Relating to Privileges and Immunities between the United States and the Organization of American States. I should note that in the United Nations context, the United States has been forced to invoke this principle some two dozen times.

Some have asked why the United States waited until its Ambassador and diplomats in Managua were expelled by the Nicaraguan Government to order the departure of Ambassador Tunnermann and Major Sampson for abuses of their privilege of residence.

Prior to the events of this week, the United States had information on which to base its request for their departure. Nevertheless, in the spirit of the Esquipulas Agreement, we deferred action in order to

Nicaragua on Aug. 7, 1987, at Guatemala City, may be found at DEPT. ST. BULL., No. 2127, October 1987, at 56, 26 ILM 1166 (1987). For the text of the Declaration of Esquipulas—"Esquipulas I"—signed by the five Presidents on May 25, 1986, at Esquipulas, Guatemala, see DEPT. OF STATE, AMERICAN FOREIGN POLICY: CURRENT DOCUMENTS, 1986, at 764, and UN Doc. S/18106 (May 28, 1986).

The Sapoa Agreement was the cease-fire agreement between the Nicaraguan resistance and the Sandinista regime, concluded Mar. 23, 1988. An English translation of the text may be found at DEPT. OF STATE, CENTRAL AMERICA REGIONAL BRIEF, NICARAGUA: NEGOTIATING DOCUMENTS OF THE SAPOA TRUCE 2 (1988).

avoid giving the Nicaraguan Government a pretext for taking the kinds of actions it perpetrated this week

It was important to have an Ambassador and a functioning Embassy in Managua. Obviously, Nicaragua's actions against our diplomats in Nicaragua and against the Nicaraguans who dare to speak out against repression of democracy and human rights in Nicaragua have removed the basis for such restraint on the part of the United States.

On July 11, without provocation, the Nicaraguan Government expelled the United States Ambassador and seven other Embassy officers from Nicaragua for engaging in normal diplomatic activities. The Embassy was in contact with major political groups, including the opposition, in Nicaragua as are foreign Embassies everywhere, including in the United States. The Sandinista Government's charges against our Ambassador and his staff are patently false and ridiculous.

These Sandinista actions are not directed only against the United States. They are calculated efforts to subdue, isolate, and intimidate the Nicaraguan people. We are outraged that the Sandinista Government has, once again, sought to turn its internal conflict with the Nicaraguan people into a bilateral issue with the United States.⁷

The special meeting closed without taking any action on the matter brought to its attention by the Permanent Representative of Nicaragua.⁸

HUMAN RIGHTS

(U.S. *Digest*, Ch. 3, §6)

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

On May 20, 1988, President Ronald Reagan forwarded to the Senate for its advice and consent to ratification, subject to certain reservations, understandings and declarations, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly unanimously on December 10, 1984,¹ and signed by the United States on April 18, 1988.

In his letter of transmittal, the President, in accordance with recommendations from the Department of State, stated his intent, when depositing the United States (instrument of) ratification, to make a declaration, pursuant to Article 28 of the Convention, that the United States does not recognize the competence of the Committee against Torture (provided for in Articles 17-24 of the Convention) to make confidential investigations pursuant to Article 20 of charges that torture is being systematically practiced in the United States. In addition, the President stated, he intended not to make declarations pursuant to Articles 21 and 22 of the Convention, which would

⁷ Dept. of State File No. P88 0089-2068.

⁸ OAS Doc. OEA/SER.G, CP/ACTA 745/88 (1988).

¹ GA Res. 39/46 (Dec. 10, 1984) (entered into force June 26, 1987).

recognize that Committee's competence to receive and consider communications from states and individuals alleging that the United States is violating the Convention. The President believed that a final U.S. decision to accept the competence of the Committee in this regard should be withheld until there had been an opportunity to assess its work (after a sufficient body of experience with the Committee had been developed). He noted the possibility of future U.S. acceptance of that competence, pursuant to Articles 20, 21 and 22 of the Convention, if experience with the Committee should prove satisfactory and if the United States should consider this step desirable.

The President's letter of transmittal was accompanied by a report on the Convention from Secretary of State George P. Shultz, dated May 10, 1988, with an attached memorandum that summarized the general background to the Convention and discussed its provisions, as well as the reservations, declarations and understandings recommended by the Departments of State, Justice and Defense. Portions of the Secretary's letter follow:

The Convention marks a further significant step in the development during this century of international measures against torture and other inhuman treatment or punishment. The core provisions of the Convention establish a regime for international cooperation in the criminal prosecution of torturers relying on so-called "universal jurisdiction." Each State Party is required either to prosecute torturers who are found in its territory or to extradite them to other countries for prosecution. . . .

The United States contributed significantly to the development of the final Convention, especially in proposing that the Convention focus on torture rather than on other relatively less abhorrent practices and that the Convention conform more closely to comparable articles of the Conventions on Hijacking, Sabotage, Protection of Diplomats, and Hostages, aiming at a strong and effective Convention that would gain the widest possible adherence. In October 1984, a Joint Resolution of Congress expressed support for the involvement of the U.S. Government in the formulation of international standards and effective implementing mechanisms against torture, particularly through the draft U.N. Convention against Torture.

In view of the large number of States concerned, it was not possible to negotiate a treaty that was acceptable to the United States in all respects. Accordingly, certain reservations, understandings, and declarations have been drafted to reflect the federal system of the United States, to clarify the definition of "torture," to ensure that the provisions relating to extradition and deportation are consistent with U.S. treaty obligations and U.S. law, and to reserve both to the compulsory jurisdiction of the International Court of Justice and to the competence of the Committee against Torture to initiate investigations of the United States. In addition, a declaration that the Convention is not self-executing is recommended. With such a declaration, the provisions of the Convention would not of themselves become effective as domestic law. The Department of Justice is of the view that, with the

inclusion of the recommended reservations, understandings and declarations, no constitutional or other legal obstacles to United States ratification exist.²

DIPLOMATIC PRIVILEGES AND IMMUNITIES

(U.S. *Digest*, Ch. 4, §1)

Limitation on Use of Foreign Mission Incompatible with Status

Section 215 of the Foreign Missions Act, as added by section 128(a) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Public Law No. 100-204,¹ was enacted in response to congressional concerns about the use of diplomatic or consular (foreign mission) premises, in particular, premises of Permanent Missions to the United Nations, that were entitled to inviolability under United States laws and treaties, by foreign individuals not entitled to residential immunity or by foreign state commercial enterprises not entitled to the immunity accorded to diplomatic or consular office premises.²

Section 215(a) prohibits a foreign mission from allowing an "unaffiliated alien" the use of any premise of that mission "which is inviolable under United States law (including any treaty) for any purpose which is incompatible with its status as a foreign mission, including use as a residence." Under section 215(b), a residence does not include "such temporary lodging" that the Secretary of State may permit by regulations. Section 215(c) authorizes the Secretary to waive the limitation on use established by section 215(a), and also to revoke such a waiver, 30 days after written notification of the waiver or of its revocation, as well as the reasons therefor, to the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations. Section 215(d) requires the Secretary of State to submit a report concerning implementation of section 215 not later than 180 days after enactment and to submit such other reports concerning changes in implementation as may be necessary.³

² S. TREATY DOC. NO. 20, 100th Cong., 2d Sess. v-vi (1988).

Under Article 1(1) of the Convention, torture is defined as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

¹ 101 Stat. 1331, 1343 (1987) (to be codified at 22 U.S.C. §4315).

² See H.R. REP. NO. 34, 100th Cong., 1st Sess. 20-21 (1987).

³ For the Department's report, see enclosures to letters from J. Edward Fox, Assistant Secretary of State for Legislative Affairs, to Vice President George Bush, President of the Senate, and to Speaker of the House James Wright, June 22, 1988, Dept. of State File Nos. P88 0089-1535, 1536, 1537 *ff.*

Section 215(e) defines the term "foreign mission" to include any international organization as defined in section 209(b) of the Foreign Missions Act (22 U.S.C. §4309(b) (1982)). It defines "unaffiliated alien," with respect to a foreign country, as an alien admitted to the United States as a nonimmigrant, who is not a member of the foreign country's mission or a member of such an individual's family.

Under section 128(b) of Public Law No. 100-204, the amendment of the Foreign Missions Act by the addition of section 215 became applicable to all foreign missions upon the date of enactment, except as to any nonimmigrant alien using a foreign mission as a residence or a place of business on that date. As to these individuals, the amendment was to apply beginning 6 months after the date of enactment, and the Secretary of State, upon a finding of hardship to the alien, might delay its effective date with respect to that person for not more than 6 (further) months.

In a circular note to the Chiefs of Mission at Washington, dated February 23, 1988, the Secretary of State summarized the provisions in question and asked that missions submit all requests for waivers of the statutory restrictions by March 31, 1988. They should, however, be aware, the note cautioned, that the Department intended to grant waivers on a "limited and exceptional basis." For foreign missions that had not received waivers, the restriction on the use of foreign mission property as a residence or as a place of business by prohibited individuals (i.e., unaffiliated aliens) was to take effect no later than June 22, 1988.⁴

In a further circular note to the Chiefs of Mission at Washington, dated June 13, 1988, the Secretary of State informed them that few requests for waivers had been received. The Department viewed the lack of such requests as an indication that the missions considered that the current use of their diplomatic or consular offices and residential premises was compatible with the "inviolable status and accepted use of such properties." The note requested, nevertheless, written confirmation from the missions that they considered themselves in compliance with the statutory provision.

The note also answered some inquiries that had been received from missions, as follows:

The Department has received inquiries regarding the specific application of the statute, certain of which relate to the use of inviolable residential property by domestic servants and personal guests of members of the mission. The Chiefs of Mission are informed that the Department considers the use of diplomatic or consular residences by domestic servants as a compatible use not requiring a waiver by the Secretary, provided that such individuals are registered with the Department's Office of Protocol. With regard to personal guests, the regulations now under development in the Department will permit the temporary lodging of such individuals. The long term use of a diplomatic or consular residence by unaffiliated individuals, however, is restricted under the new law.

⁴ *Id.*, No. P88 0089-1545. For a parallel circular note from the U.S. Mission to the United Nations to the Permanent Missions and the Permanent Observer Offices to the United Nations, Mar. 7, 1988, see *id.*, No. P88 0088-1179.

Also in response to inquiries the Chiefs of Mission are advised that the Department understands that the legislation is not intended to prevent traditional and accepted uses of diplomatic and consular office[s] and inviolable residential property. The legislation is compatible with Article 41(3) of the Vienna Convention on Diplomatic Relations and Article 55(2) of the Vienna Convention on Consular Relations which provide that "The premises of the mission must not be used in any manner incompatible with the functions of the mission" Thus, the use of diplomatic or consular office space by representatives of private commercial entities or by miscellaneous government offices who are engaged in activities that do not constitute accepted diplomatic or consular functions has always been considered an unacceptable use of mission premises.⁵

INTERPRETATION OF TREATIES

(U.S. *Digest*, Ch. 5, §2)

INF Treaty

On May 27, 1988, by a vote of 93 to 5, the Senate gave its advice and consent to ratification of the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, signed on December 8, 1987, at Washington on the occasion of the state visit of Mikhail Gorbachev, General Secretary of the Central Committee of the Communist Party of the Soviet Union. The resolution of ratification postulated the following condition, among others:

(1) Provided, that the Senate's advice and consent to ratification of the INF Treaty is subject to the condition, based on the Treaty Clauses of the Constitution, that—

(A) the United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification;

(B) such common understanding is based on:

(i) first, the text of the Treaty and the provisions of this resolution of ratification; and

(ii) second, the authoritative representations which were provided by the President and his representatives to the Senate and its Committees, in seeking Senate consent to ratification, insofar as such representations were directed to the meaning and legal effect of the text of the Treaty; and

(C) the United States shall not agree to or adopt an interpretation different from that common understanding except pursuant to Sen-

⁵ *Id.*, No. P88 0089-1541. For a parallel circular note from the U.S. Mission to the United Nations to the Permanent Missions and the Permanent Observer Offices to the United Nations, July 6, 1988, see *id.*, No. P88 0088-2276.

ate advice and consent to a subsequent treaty or protocol, or the enactment of a statute; and

(D) if, subsequent to ratification of the Treaty, a question arises as to the interpretation of a provision of the Treaty on which no common understanding was reached in accordance with paragraph (2), that provision shall be interpreted in accordance with applicable United States law.¹

In a statement issued the same day, President Reagan, while expressing appreciation for the Senate leadership's action in obtaining "timely approval" of the Treaty, noted, nevertheless, his "concerns about the constitutionality of some provisions of the resolution of ratification, particularly those dealing with interpretation," regarding which he would, he said, communicate with the Senate "in due course."²

After his return from the Moscow Summit Meeting with General Secretary Gorbachev, at which the two leaders exchanged their respective instruments of ratification of the Treaty on June 1, 1988, the President addressed the "one provision" giving him "serious concern," in a letter to the Senate, dated June 10, 1988, that read in part as follows:

The Senate condition relating to the Treaty Clauses of the Constitution apparently seeks to alter the law of treaty interpretation. The accompanying report of the Committee on Foreign Relations accords primacy, second only to the Treaty text, to all Executive branch statements to the Senate above all other sources which international forums or even U.S. courts would consider in interpreting treaties. It subordinates fundamental and essential treaty interpretative sources such as the treaty parties' intent, the treaty negotiating record and the parties' subsequent practices.

Treaties are agreements between sovereign states and must be interpreted in accordance with accepted principles of international law and United States Supreme Court jurisprudence. As a practical matter, the Senate condition only can work against the interests of the United States by creating situations in which a treaty has one meaning under international law and another under domestic law. Unilateral restrictions on the United States should be avoided, especially in a treaty affecting vital national security interests. With respect to U.S. law, the President must respect the mutual understandings reached with the Senate during the advice and consent process. But Executive statements should be given binding weight only when they were authoritatively communicated to the Senate by the Executive and were part of the basis on which the Senate granted its advice and consent to ratification. This is in accordance with the legal standards applied by our courts in determining legislative intent. I commend the thoughtful statements made during the Senate debate by Senators [Arlen] Specter, [William V.] Roth, [Jr., Pete] Wilson, and others which amplify these concerns.

This Administration does not take the position that the Executive branch can disregard authoritative Executive statements to the Senate,

¹ 134 CONG. REC. S6937 (daily ed. May 27, 1988).

² 24 WEEKLY COMP. PRES. DOC. 683 (June 6, 1988).

and we have no intention of changing the interpretation of the INF Treaty which was presented to the Senate. On the contrary, this Administration has made it clear that it will consider all such authoritative statements as having been made in good faith. Nonetheless the principles of treaty interpretation recognized and repeatedly invoked by the courts may not be limited or changed by the Senate alone, and those principles will govern any future disputes over interpretation of this Treaty. As Senator [Richard G.] Lugar pointed out during the debate, the Supreme Court may well have the final judgment, which would be binding on the President and Senate alike. Accordingly, I am compelled to state that I cannot accept the proposition that a condition in a resolution to ratification can alter the allocation of rights and duties under the Constitution; nor could I, consistent with my oath of office, accept any diminution claimed to be effected by such a condition in the constitutional powers and responsibilities of the Presidency.

I do not believe that any difference of views about the Senate condition will have any practical effect on the implementation of the Treaty. I believe the Executive branch and the Senate have a very good common understanding of the terms of the Treaty, and I believe that we will handle any question of interpretation that may arise in a spirit of mutual accommodation and respect. In this spirit I welcome the entry into force of the Treaty and express my hope that it will lead to even more important advances in arms reduction and the preservation of world peace and security.³

The Senate's resolution of ratification was made subject to the following, further conditions, declarations, and a declaration and understanding:

(a) CONDITIONS:

(2) The advice and consent of the Senate to the ratification of the INF Treaty is further subject to the condition that in connection with the exchange of the instruments of ratification pursuant to Article XVII of the Treaty, the President shall obtain the agreement of the Union of Soviet Socialist Republics that the agreement concluded by exchange of notes in Geneva on May 12, 1988 between the United States and the Union of Soviet Socialist Republics as to the application of the Treaty to intermediate-range and shorter-range missiles flight-tested or deployed to carry or be used as weapons based on either current or future technologies and as to the related question of the definition of the term "weapon-delivery vehicle" as used in the Treaty, the agreed minute of May 12, 1988 signed by Ambassador Maynard W. Glitman and Colonel General N. Chervov reflecting the agreement of the Parties regarding certain issues related to the Treaty, and the agreements signed on May 21, 1988 in Vienna and Moscow, respectively, correcting the site diagrams and certain technical errors in the Treaty, are of the same force and effect as the provisions of the Treaty.

(3) That prior to the exchange of the instruments of ratification pursuant to Article XVII of the Treaty, the President shall certify that it is the common understanding of the United States and the Soviet

³ *Id.* at 779, 780 (June 13, 1988). See further S. EXEC. REP. NO. 15, 100th Cong., 2d Sess. 87-108, 437-46 (1988).

Union that if either Party produces a type of ground-launched ballistic missile (GLBM) not limited by the Treaty using a stage which is outwardly similar to, but not interchangeable with, a stage of an existing type of intermediate-range GLBM having more than one stage, it may not produce any other stage which is outwardly similar to, whether or not it is interchangeable with, any other stage of an existing type of intermediate-range GLBM.

(b) DECLARATIONS:

(1) The Senate's advice and consent to ratification of the Treaty is further subject to the following:

Declaration.—The Senate declares that—

(A) because the incentive for Soviet noncompliance, and the difficulty of monitoring will be greater for any strategic arms reduction talks (START) agreement than for the INF Treaty, the United States should rely primarily on its own national technical means of verification rather than any cooperative verification scheme, such as the on-site inspection procedures agreed to in the INF Treaty;

(B) because the United States enjoys a comparative advantage in the development of nonnuclear technologies that can increase the nuclear threshold and reduce the likelihood of war and because START and the INF Treaty will increase the military need to rely more heavily on such nonnuclear capabilities, in any subsequent agreement between the United States and the Soviet Union regarding the reduction of Strategic Weapons, it should be the position of the United States that no restrictions should be established on current or future nonnuclear air- or sea-launched cruise missiles developed or deployed by the United States, or on nonnuclear ground launched cruise missiles of ranges not prohibited by the INF Treaty; and

(C) because the reductions contemplated under any START agreement would change the character and optimal mix of strategic nuclear forces that the United States will need to maintain stability, the United States Congress and the President should agree on the character of, and funding for, these forces before any START agreement, framework or otherwise, is signed or agreed to.

(2) Provided that the Senate's advice and consent to ratification of the INF Treaty is subject to the condition:

Declaration.—It shall be the declared policy of the United States of America that, as an integral factor in its decision to adhere to this Treaty, the United States intends to continue to negotiate with the Union of Soviet Socialist Republics a treaty effecting reductions in strategic nuclear forces of the Parties and, in conjunction with its NATO Allies, to negotiate a treaty establishing conventional stability in Europe. In so doing, it shall be guided by the following principles and considerations:

(A) a main object of such future treaties shall be international stability and reduction of the risk of war by obtaining general equivalence in the resultant strategic forces of the Parties;

(B) during any negotiations contemplated by this declaration, the United States shall act in close consultation with its Allies who are

member states of the North Atlantic Treaty Organization and with such other states as appropriate;

(C) negotiations contemplated by this declaration shall also be conducted with close and detailed consideration of the advice of the United States Senate, and the Senate should be kept fully apprised of all significant proposals made to the Union of Soviet Socialist Republics and, with respect to such negotiations, the judgments and recommendations of the United States Senate shall be given full and highest consideration and due regard;

(D) the negotiations contemplated by this declaration shall also seek to secure regimes of effective verification and mechanisms for full compliance which build upon the verification regime and compliance mechanisms of the present Treaty, strengthening them appropriately for any subsequent treaty;

(E) in accordance with the Constitutional process of the United States, the United States shall, consistent with correctly construed principles of international law, not be bound to adhere to or observe any treaty contemplated by this declaration until ratification thereof pursuant to the advice and consent of the Senate. However, nothing in this declaration shall imply that the United States will take an action of such nature as to make impossible the performance of any future treaty contemplated by this declaration after the signing of such treaty and during the period in which there is a clear prospect of timely ratification thereof;

(F) the United States considers full and exact compliance with the present treaty and with all other existing arms control agreements between the Parties to be a major issue affecting (i) the proposals and attitudes of the United States with respect to the future treaties contemplated hereby and (ii) proportionate and appropriate responses with respect to such existing agreements;

(G) pursuant to this declaration, any joint statement by the United States of America with the Union of Soviet Socialist Republics of a framework for the negotiation of strategic arms treaties contemplated hereby, and such framework itself, shall serve for the purpose only of guiding the conduct of the negotiations which the United States herein has declared its desire to pursue expeditiously, and shall not constrain any military programs of the United States unless otherwise provided for in accordance with Section 33 of the Arms Control and Disarmament Act; and

(H) the capability of the United States of America to monitor any future treaty contemplated by this declaration shall be strengthened in order to increase the ability of the United States to detect violations thereof.

(c) DECLARATION AND UNDERSTANDINGS:

The advice and consent to ratification given by the Senate under this resolution of ratification is subject to the following declaration and understandings, which the President, using existing authority, shall communicate to the Union of Soviet Socialist Republics, in connection with the exchange of the instruments of ratification of the Treaty:

(1) the declaration that the Senate strongly believes that respect for human rights and fundamental freedoms is an essential factor to ensure the development of friendly relations and cooperation between the United States and the Soviet Union and calls upon the President to use every opportunity to stress the inherent link between respect for human rights and the achievement of lasting peace;

(2) the understanding that the President shall seek sustained and demonstrable progress by the Soviet Union in its implementation of the provisions of—

(A) the Final Act of the Conference on Security and Cooperation in Europe (hereafter referred to as the "Helsinki Final Act"),

(B) the Madrid Concluding Document of the Commission on Security and Cooperation in Europe, done September 9, 1983 (hereafter referred to as the "Madrid Concluding Document"),

(C) the Universal Declaration of Human Rights (also known as the "Universal Declaration"), and

(D) other international human rights agreements to which the Soviet Union is a signatory or party, including provisions relating to—

(i) the freedom of thought, conscience, religion, and belief, without regard to race, sex, language, religion, or national origin,

(ii) the recognition and respect for the rights of individuals, including those belonging to national minorities, to enjoyment and practice of their cultures, heritage, history, and national consciousness,

(iii) the right of freedom of movement for individuals within the Soviet Union and the right to leave the Soviet Union, without arbitrary and capricious barriers, and

(iv) the right of individuals to know and act upon their rights and duties in these agreements; and

(3) the understanding that the United States, through the Helsinki process, will expect full compliance, as evidenced by specific action, by the Soviet Union with its commitments in the field of human rights and fundamental freedoms and will seek to strengthen these commitments through review meetings and a balanced number of follow-up activities which will advance verifiable implementation of the human rights provisions of the Helsinki Final Act and the Madrid Concluding Document.⁴

⁴ 134 CONG. REC., *supra* note 1, at S6937-38.

INTERNATIONAL DECISIONS

PETER D. TROOBOFF*

Editor's Note

For the past 7 years, Monroe Leigh has edited this section with the able assistance of his associates at Steptoe & Johnson. His fine eye for accuracy and his fairness remain as standards for his successors. The *Journal* acknowledges its great debt to him and to his firm.

We begin in this issue with a modified approach to preparing the section. We seek volunteers among skilled young lawyers in practice, government or international civil service, and teaching to assist by preparing case summaries. As in the past, we count upon our readers to send us important recent United States and foreign court judgments and arbitral awards.

P. D. T.

Hague Service Convention—scope and application—role of internal law

VOLKSWAGEN AKTIENGESELLSCHAFT v. SCHLUNK. 108 S.Ct. 2104.
U.S. Supreme Court, June 15, 1988.

In this first decision by the United States Supreme Court on the scope and application of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, better known as the Hague Service Convention,¹ petitioner, a West German company, challenged the respondent's attempt to serve process on petitioner by serving its wholly owned U.S. subsidiary in accordance with the state's rules rather than pursuant to the procedures of the Convention. The Circuit Court of Cook County, Illinois, found that the relationship between the German parent and the U.S. subsidiary was such that, under state-law rules of agency, the U.S. subsidiary was the parent's involuntary agent for service of process. Because service could thus be perfected entirely within the United States, the court held that it was not necessary to follow the procedures of the Hague Service Convention. The Illinois Appellate Court affirmed,² and the Illinois Supreme Court denied leave to appeal.³ The U.S. Supreme Court (per O'Connor, J.) affirmed and *held*: (1) the Hague Service Conven-

* Mary Ellen O'Connell of the District of Columbia Bar assisted the Editor in the preparation of the summaries in this issue.

¹ *Opened for signature* Nov. 15, 1965, 20 UST 361, TIAS No. 6628, 658 UNTS 163 [hereinafter *Convention*].

² 145 Ill. App. 3d 594, 503 N.E.2d 1045 (1986).

³ 112 Ill.2d 595 (1986).

tion is "mandatory" and preempts inconsistent state-law methods of service in all cases to which it applies;⁴ (2) the Convention applies where there is occasion to transmit a document abroad to charge persons with formal notice of a pending action;⁵ and (3) whether it is necessary to transmit a document abroad for such purposes is determined by the forum state's internal law.⁶

The Court began its analysis with the text of the treaty, observing that the Convention by its terms applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."⁷ But the Convention does not specify when there is "occasion to transmit" a document "for service abroad," and the Court accordingly examined the negotiating history of the Convention. The preliminary draft provided that the Convention was to apply "where there are grounds" to transmit documents to persons staying abroad. When one delegate proposed amending the section by adding the phrase "according to the law of the requesting state," several delegates expressed the view that such an amendment was unnecessary. They reasoned that the requesting state's law would necessarily determine whether "grounds exist" for transmitting documents abroad. The proposed amendment was rejected. However, the reporter explained that, under the formulation that was ultimately adopted, the law of the requesting state would determine when a document must be served abroad. The Court thus concluded that the forum's internal law governs whether the procedures of the Convention must be followed.

The Court rejected the petitioner's argument that such an interpretation would be inconsistent with the purpose of the Convention "to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time."⁸ This purpose could easily be circumvented, the petitioner argued, if the state parties remained free to authorize methods of serving process on foreigners that did not require the transmission of documents abroad. The Court acknowledged that one of the purposes of the Convention was to eliminate one such method of service, *notification au parquet*, pursuant to which service of process on foreign defendants could be accomplished by depositing documents with designated local officials. Under this procedure, the documents were thereafter to be transmitted to the defendant through diplomatic channels. Service was deemed complete upon the official's receipt of the documents, whether or not the documents were ultimately transmitted by the official or received by the defendant. The Court left open the question whether the Convention applies to *notification au parquet*, but observed that "there is no comparable evidence in the negotiating history that the Convention was meant to apply to substituted service on a

⁴ 108 S.Ct. 2104, 2108.

⁵ *Id.*

⁶ *Id.* at 2109-10.

⁷ Convention, *supra* note 1, Art. 1.

⁸ 108 S.Ct. at 2109-10 (quoting the Preamble to the Convention, *supra* note 1).

subsidiary . . . , which clearly does not require service abroad under the forum's internal law."⁹

The Court also rejected the petitioner's argument that service on its subsidiary necessarily required the transmission of documents abroad, as the subsidiary would have to transmit the documents to the parent if the latter were ultimately to receive actual notice of the action. The Court held that "[w]here service on a domestic agent is valid and complete . . . the Convention has no further implications. Whatever internal, private communications take place between the agent and the foreign principal are beyond the concerns of this case."¹⁰

In the end, the Court conceded that its interpretation "does not necessarily advance" the Convention's purpose of ensuring adequate notice to foreign defendants. At the same time, the Court doubted that any country would "draft its internal laws deliberately so as to circumvent the Convention in cases in which it would be appropriate to transmit judicial documents for service abroad."¹¹

Justice Brennan, writing for himself and Justices Marshall and Blackmun, concurred in the judgment but disagreed with the majority's conclusion that the forum nation's internal law is dispositive of the applicability of the Convention. "Under the Court's analysis," Justice Brennan observed,

a forum nation could prescribe direct mail service to any foreigner and deem service effective upon deposit in the mailbox, or could arbitrarily designate a domestic agent for any foreign defendant and deem service complete upon receipt domestically by the agent even though there is little likelihood that service would ever reach the defendant.¹²

The Court's interpretation, in Justice Brennan's view, conflicts with the primary purpose of the Convention, set forth in its Preamble, "to ensure that . . . documents to be served abroad . . . be brought to the notice of the addressee in sufficient time."¹³ Relying on the Preamble, certain statements in the negotiating history that conflicted with the statements on which the majority relied, and the clear purpose of the Convention to eliminate *notification au parquet*, Justice Brennan concluded that the Convention "embod[ies] a substantive standard that limits a forum's latitude to deem service complete domestically."¹⁴

Justice Brennan acknowledged that the Convention does not precisely define the contours of the substantive standard, and he did not attempt to define them himself beyond quoting the statement in the final report that "[a]ll of the transmission channels (prescribed by the convention) *must have as a consequence the fact that the act reach the addressee in due time.*"¹⁵ Because

⁹ *Id.* at 2110.

¹⁰ *Id.* at 2112.

¹¹ *Id.*

¹² *Id.* at 2114 (Brennan, J., concurring).

¹³ *Id.* at 2113 (quoting the Preamble to the Convention, *supra* note 1).

¹⁴ *Id.* at 2112.

¹⁵ *Id.* at 2115 (quoting 3 CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, ACTES ET DOCUMENTS DE LA DIXIÈME SESSION (NOTIFICATION) 367 (1965) (emphasis supplied by Justice Brennan)).

the method of service employed by the respondent was reasonably calculated to apprise the defendant of the action in due time, Justice Brennan had no trouble concluding that it did not run afoul of the Convention.

* * * *

Justice Brennan is plainly correct in his conclusion that the Convention does not permit service by mail on a defendant residing in another state party. Although discussed by neither opinion, Article 10 of the Convention is relevant to this issue. That section provides in pertinent part that, "Provided the State of destination does not object, the present Convention shall not interfere with—(a) the freedom to send judicial documents, by postal channels, directly to persons abroad." Most U.S. courts that have considered the question have concluded that this provision does not authorize formal service of process by mail.¹⁶ Moreover, many of the parties to the Convention, including the Federal Republic of Germany, have objected pursuant to Article 10 even to the "sending" of judicial documents through the mails. Clearly, therefore, the Convention does not permit service by mail to persons within the territory of another state party, whether or not the forum state deems such service complete upon deposit in the mailbox.

Nevertheless, the majority opinion need not be interpreted as permitting service by mail. As the U.S. subsidiary was deemed petitioner's agent for purposes of service of process, service on the subsidiary could be considered the equivalent of service on the parent. Any subsequent communications between parent and subsidiary thus would arguably not constitute a "transmission" of documents within the meaning of the treaty. This rationale would distinguish service on an agent from any form of service requiring the delivery of judicial documents abroad by third parties, such as service by mail or *notification au parquet*.¹⁷ To the extent, however, that forum law determines who an "agent" is for these purposes, Justice Brennan's concerns would remain well-founded.

Schlunk is the second decision in the course of a year in which the Supreme Court has interpreted narrowly an important multilateral treaty on international judicial assistance. Unlike the decision last Term in *Societe Nationale Aerospatiale v. United States District Court*,¹⁸ however, the effects of this decision are likely to be felt more strongly by U.S. nationals being sued abroad than by foreign defendants being sued in the United States. Since aliens are

¹⁶ See, e.g., *Hantover, Inc. v. Omet S.N.C. of Volentieri & C.*, No. 87-1140-CV-W-JWO (W.D. Mo. June 9, 1988); *Pochop v. Toyota Motor Co.*, 111 F.R.D. 464 (S.D. Miss. 1986).

¹⁷ The Court's opinion suggests a different distinction. The majority concluded that, if service is deemed completed domestically, subsequent communications abroad do not implicate the Convention if they are private in nature. Presumably, service by mail could be distinguished on the ground that it requires the intervention of public authorities (i.e., the postal authorities). This distinction, however, is unsatisfactory: should the result be any different if the services of a private courier were used? The distinction proposed in the text would distinguish service on an agent from forms of service requiring the intervention of any third party, whether public or private.

¹⁸ 107 S.Ct. 2542 (1987), summarized in 81 AJIL 944 (1987).

entitled to the same due process guarantees in the United States as nationals, they need not apprehend forms of domestic service that are not reasonably calculated to result in actual notice.¹⁹ As Justice Brennan observed, however, other nations are not bound by our Constitution, and U.S. citizens sued abroad must rely instead on the guarantees of the Convention. After the Court's decision in *Schlunk*, a U.S. national complaining of inadequate service may find foreign courts less receptive to any arguments based on the Hague Service Convention.

CARLOS M. VÁZQUEZ
Of the District of Columbia Bar

Act of state—extraterritorial exception—situs of debt

BANDES v. HARLOW & JONES, INC. 852 F.2d 661.
U.S. Court of Appeals, 2d Cir., July 19, 1988.

The former majority shareholders of Industria Nacional de Clavos y Alambres de Puas, S.A. (INCA), a large Nicaraguan steel company, sought to recover from Harlow & Jones, Inc. (H & J), a U.S. steel company, the purchase price of a shipment of undelivered steel billets. Following the Sandinista revolution, the Nicaraguan Government had "intervened" in INCA and it, too, demanded the funds that H & J interpleaded into the court. The district court rejected the claim of the Sandinista Government and allocated the funds to the benefit of all parties who held shares in the company prior to the intervention.¹ On cross-appeals by the claimants, a panel of the United States Court of Appeals for the Second Circuit (per Kaufman, J.) affirmed in part and reversed in part, and *held*: the act of state doctrine does not bar judicial resolution of the dispute over the funds; the actions of the Sandinista Government amounted to a taking without compensation that will not be enforced by the U.S. courts; and the district court's allocation of pro rata shares for all of the preintervention stockholders, including minority interests, was equitable.²

Since 1960, INCA has manufactured and sold steel products for Nicaraguan consumption and for export throughout Central America. INCA was operated by members of the Bandes family who collectively owned 72.9 percent of the company's shares. Another 18.2 percent was issued in 1976 to two Nicaraguan generals, one of whom was the brother of then-dictator

¹⁹ See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The petitioner in *Schlunk* did not challenge either the constitutionality of the method of service employed or the state's basis for personal jurisdiction over it, and the Supreme Court accordingly did not address those issues. Compare *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925) (activities within forum state of a wholly owned subsidiary are not sufficient to subject parent corporation to forum's jurisdiction).

¹ 570 F.Supp. 955 (S.D.N.Y. 1983).

² Nos. 1146 and 1281, slip op. at 10-23 and 25.

Anastasio Somoza. The remaining 8.9 percent was held by more than 50 Nicaraguan businessmen.³

In late June 1979, toward the end of Nicaragua's civil war, the Bandes family fled to Honduras. Shortly thereafter, having prevailed in the war, the Sandinista revolutionary forces "intervened" and expropriated⁴ INCA. On July 20, 1979, pursuant to Decree No. 3 of the Government Council,⁵ the Attorney General of Justice of Nicaragua was empowered to intervene, requisition and confiscate the assets of the Somoza family and military personnel who had fled the country since December 1977. On July 22, 1979, Decree No. 10 was enacted, declaring that managers of businesses who abandoned or hindered the operation of the economy had committed a crime, and authorizing the state to intervene and take control of abandoned businesses. The holdings of the Bandes family and the Somoza regime's generals were thus intervened and the government intervenor was placed in control of INCA.⁶

In 1978, prior to the fall of the Somoza Government, INCA placed an order with H & J for 2,000 tons of steel billets for which it advanced \$460,000. The revolution followed and the steel was never delivered. After the Sandinista intervention of INCA, the Bandes family head, acting pursuant to a long-held general power of attorney from INCA, asked H & J to return to the family shareholders the \$460,000. He subsequently concluded a settlement with H & J for \$420,000, amounting to the purchase price, less the cost of rescission and other setoffs owed by INCA to H & J. Two days before making payment to the Bandes family, H & J received a telex from the Nicaraguan intervenor stating that INCA was operating under the administration of the Nicaraguan Government and that the intervenor alone was authorized to represent the company in business transactions.

The Bandes family sued H & J in the Southern District of New York. H & J responded by depositing \$420,000 with the court and filing an interpleader complaint against the Bandes family and the government intervenor. Both claimants moved for summary judgment. The district court held that the act of state doctrine did not bar judicial resolution of the dispute and that the Sandinista Government's intervention of INCA amounted to a taking without compensation contrary to U.S. law and policy. The district court thus refused to recognize the intervenor's claim and

³ *Id.* at 5-6.

⁴ In the district court, the claimants disputed the meaning and legal significance of the term "intervention." The Bandes family maintained that the intervention constituted a permanent taking. The representative of the Nicaraguan Government argued that it was only a temporary measure. The appellate court, echoing the reasoning of the district court, held that "[b]ecause, during the nine years of this litigation, INCA has been solely controlled by the Sandinista Government without any attempt to indemnify the Bandes family, . . . the company has been expropriated to the extent of permanent ownership and control over the Bandeses's property." *Id.* at i n.1.

⁵ The texts of the relevant Sandinista decrees are reprinted as notes to the district court's opinion. 570 F.Supp. at 957-59 nn.1-2 and 5-8.

⁶ Later, the government intervenor held a general shareholders meeting and removed the Bandeses from their positions as officers of INCA. Slip op. at 6-7.

allocated the fund (which, including interest, had grown to nearly \$900,000) to the benefit of the preintervention shareholders as follows: \$171,759 plus interest to the preferred shareholders; nearly 73 percent of the balance to the Bandes family; and the remainder to the minority shareholders, including 18.2 percent reflecting the Somoza generals' pro rata portion.⁷ Both claimants appealed.

The court of appeals affirmed in part and reversed in part.⁸ Judge Kaufman held that the act of state doctrine—based on notions of comity, constitutional principles and a recognition of the practical limits of national jurisdiction—does not apply when property confiscated without compensation by a foreign sovereign is within the United States at the time of the foreign governmental action. In such circumstances, when another state attempts to seize property held here, U.S. jurisdiction is "paramount."⁹

The court found the situs of the H & J fund to be the United States because H & J is domiciled in Connecticut. Accordingly, "[t]he act of state doctrine . . . does not apply, and we may look to our own [U.S.] laws to determine the reach of the foreign sovereign's proscriptions."¹⁰

According to the court, acts of foreign states asserted to be applicable to property in the United States will be given effect only if they "are consistent with this nation's policies."¹¹ The court had "no doubt" that the intervention of INCA "was a 'taking' contrary to United States policy," as expressed in the Fifth and Fourteenth Amendments to the U.S. Constitution prohibiting confiscations without just compensation. Finding that "compensation was never considered when the Sandinistas seized control of INCA," the court refused to enforce the intervention and affirmed the denial of the government intervenor's claim.¹²

Turning to the claimants' challenges to the distribution of the funds, the court rejected them all and affirmed the district court's allocation. The Bandes family sought on appeal to recover the entire fund, focusing its objections solely on the amount reserved for the Somoza generals. The

⁷ The district court allocated the funds "by creating the fiction of a corporate dissolution." *Id.* at 9. The district court also provided that notice would be sent to the unrepresented shareholders, and it held that any unclaimed amount would escheat to New York pursuant to that state's abandoned property law. N.Y. Aband. Prop. Law §§1200-1223 (McKinney 1944 & Supp. 1988). Slip op. at 9.

⁸ For his effort in creating the fund for the minority and preferred shareholders, the district court awarded the Nicaraguan intervenor his attorney's fees and expenses amounting to \$51,811.67 to be paid from the minority shareholders fund. Slip op. at 9. The court of appeals reversed the award of attorney's fees to intervenor because "he did nothing to create the common fund," and because of "the general policy in United States courts that each party bear the cost of his own counsel's compensation." *Id.* at 24-25.

⁹ "[T]he foreign sovereign is acting beyond its enforcement capacity when it involves itself within our nation's jurisdiction." *Id.* at 12 (emphasis in original).

¹⁰ *Id.*

¹¹ *Id.* (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §43 (1965); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §443 comment b (1987) [hereinafter RESTATEMENT (THIRD)]).

¹² *Id.* at 13.

Bandes family alleged that the generals themselves "confiscated" the stock from the family and that this wrongful act should not be enforced by U.S. courts. Terming this argument "disingenuous," the court found that INCA in fact had benefited "as a result of the influence wielded by the Somoza associates." The court held that the act of state doctrine barred an inquiry into the reasons for the Nicaraguan Government's conduct that, the Bandes family alleged, had forced the sale of INCA shares to the generals.¹³

The Nicaraguan intervenor claimed that the Bandes family should receive no part of the fund because the family's representative had failed to exhaust administrative remedies available in Nicaragua. The court held that these remedies were "illusory," noting that to avail himself of Nicaraguan remedies, the family head would have been required to appear in Nicaragua and answer criminal charges resulting from Decree No. 10, which had been enacted after his departure. Recognizing that U.S. constitutional prohibitions apply only domestically, the court held that "[n]onetheless, [it] should avoid extending the effects of another country's *ex post facto* legislation within [U.S.] borders."¹⁴

The government intervenor also argued that the interpleaded fund should be applied to repay preintervention debts owed by INCA. If this theory were accepted, the court noted, Nicaragua could collect INCA's extraterritorial debts and accomplish indirectly what the act of state doctrine would not allow to be accomplished directly. The court held that "United States policy demands that our court refuse that convolution."¹⁵

Finally, the intervenor maintained that confiscation during a time of emergency in Nicaragua was a legitimate act of government and hence not contrary to U.S. policy. The court declined to extend to another nation's attempted confiscations of property outside that nation's territory carefully circumscribed United States constitutional principles regarding the President's authority to seize property in times of national emergency.

* * * *

The Supreme Court of the United States has not passed on the applicability of the act of state doctrine to asserted expropriations by a foreign government of property located outside of the foreign state's territory at the time of taking. However, this case is in accord with the unanimous line of

¹³ *Id.* at 14-16. The court also found "due process problems" in depriving the generals—who were not parties to the action—of property without affording them notice and the opportunity to defend their interests in court. Because the Bandes family accepted and enjoyed the benefits of state favoritism—a practice also contrary to U.S. policy—its members lacked "clean hands" to claim the portion of the fund reserved for the generals. In addition, the court affirmed the reservation of an amount for the unrepresented minority shareholders.

¹⁴ *Id.* at 19.

¹⁵ *Id.* at 22. The court relied on *United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868 (2d Cir. 1976), in which the Bangladesh confiscators argued that the situs of disputed debts was in Bangladesh because they were actually security for previous debts located there. The *United Bank* court disagreed, holding that the Bangladesh confiscators should not be allowed to accomplish indirectly what the act of state doctrine otherwise precluded. 542 F.2d at 876.

lower court decisions holding that the act of state doctrine is inapplicable to takings by a foreign state of property located outside of its territory.¹⁶

The lower courts have been divided on the issue of how the territorial exception to the act of state doctrine should be applied to various types of intangible property.¹⁷ In this regard, the *Bandes* case contrasts with the 1985 decision of the U.S. Court of Appeals for the Ninth Circuit in *Tchacosh Co., Ltd. v. Rockwell International Corp.*,¹⁸ in which a panel of that circuit applied the act of state doctrine to a claim for the debt owed by a U.S. company to an Iranian company that was expropriated by the revolutionary Government of Iran. The court there affirmed the lower court's grant of summary judgment dismissing a suit by the former owner on behalf of the expropriated company for payment for work performed in Iran. The Ninth Circuit panel rejected the argument in *Tchacosh* that the underlying claim was within the extraterritorial exception to the act of state doctrine even though the corporate headquarters and principal place of business of the defendant company were in the United States. In *Tchacosh* the U.S. debtor established a separate office in Iran, all the work was performed in Iran and all the accounts for the contract appear to have been kept there. Judge Kaufman's test in the instant case based on the domicile of the debtor appears more likely to be applied in the future to the locus-of-debt issue in act of state cases in the absence of the special facts in *Tchacosh*.

MICHAEL R. CALABRESE
Of the District of Columbia Bar

International judicial assistance—cooperation of United States courts with foreign investigations

In re REQUEST FOR ASSISTANCE FROM MINISTRY OF LEGAL AFFAIRS OF TRINIDAD AND TOBAGO. 848 F.2d 1151.
U.S. Court of Appeals, 11th Cir., July 7, 1988.

Appellant, Joseph Azar, appealed the district court's denial of his motion to quash a subpoena obtained by the U.S. Department of Justice at the request of the Minister of Legal Affairs of Trinidad and Tobago. The United States had sought the subpoena to obtain Azar's Florida bank records as part of a criminal investigation in Trinidad and Tobago.¹ On review,

¹⁶ RESTATEMENT (THIRD), *supra* note 11, §443 comment b.

¹⁷ E.g., compare *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984) (act of state doctrine not applied in view of promise to pay at any branch worldwide), with *Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 474 N.Y.S.2d 689, *cert. denied*, 469 U.S. 966 (1984) (act of state applied on the basis that debt could have been enforced or collected in Cuba). See generally Note, *The Act of State Doctrine: Resolving Debt Situs Confusion*, 86 COLUM. L. REV. 594 (1986).

¹⁸ 766 F.2d 1333 (9th Cir. 1985).

¹ *In re* Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 648 F.Supp. 464 (S.D. Fla. 1986).

the Court of Appeals for the Eleventh Circuit (per Fay, J.) affirmed the district court's decision and *held* that 28 U.S.C. §1782 authorized the judicial assistance sought by the Minister of Legal Affairs even though there was no pending proceeding in Trinidad and Tobago.

The court characterized the appeal as presenting an issue of first impression, namely, "whether section 1782 requires that a proceeding be pending before a federal court may grant judicial assistance to a foreign official."² The panel decided the issue by reviewing the text and legislative history of 28 U.S.C. §1782(a), which provides that a district court may order a resident "to give his testimony or statement or to produce a document or other thing *for use in a proceeding* in a foreign or international tribunal."³ Section 1782(a) also requires that the request for assistance come from "a foreign or international tribunal or upon the application of any interested person." In this case, the request came from the Minister of Legal Affairs, who was conducting a criminal investigation of possible violations of the Exchange Control Act⁴ by Trinidad and Tobago nationals, but who had not initiated any judicial proceedings.

The court decided that the absence of a pending proceeding was not fatal to the request for judicial assistance, relying primarily on a 1964 amendment to section 1782. Prior to 1964, it was recognized that U.S. courts could not provide international judicial assistance until after the initiation of a judicial proceeding in the foreign country.⁵ In 1964, however, Congress adopted a set of proposals submitted by a Commission on International Rules of Judicial Procedure, which Congress had previously established to evaluate the provisions of federal law relating to international judicial assistance.⁶ The commission submitted to Congress several proposals⁷ intended to encourage broader judicial cooperation and provide U.S. judicial assistance on "a wholly unilateral basis."⁸

The commission's proposals included a suggestion that Congress alter the language of section 1782, which at that time stated that the assistance must be used in a "judicial proceeding *pending* in any court in a foreign country."⁹ The commission suggested that Congress drop the word "pending" and state simply that the assistance must be "for use in a proceeding in a foreign

² 848 F.2d 1151, 1152.

³ 28 U.S.C. §1782(a) (1982) (emphasis added).

⁴ Laws of Trinidad and Tobago, ch. 79:50.

⁵ See Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 n.72 (1965) (emphasis added).

⁶ 848 F.2d at 1153; see also *In re Letter Rogatory from the Justice Court, District of Montreal, Canada*, 523 F.2d 562, 565 (6th Cir. 1975).

⁷ Other proposals broadened §1782 to cover the production of documents (the section had previously applied only to depositions and testimony) and the use of evidence before administrative tribunals (it had previously applied only to the use of evidence before courts). 848 F.2d at 1151.

⁸ *In re Letter Rogatory*, 523 F.2d at 565 (quoting Amram, *New Developments in International Judicial Assistance in the United States of America*, 32 J.B.A.D.C. 24, 28 (1965)).

⁹ See Smit, *supra* note 5, at 1026 & n.72.

or international tribunal."¹⁰ Congress adopted this change as part of the legislation it enacted in 1964.

The court concluded that Congress had specifically intended to eliminate from section 1782 the requirement that a proceeding must be pending. The panel relied in part on common canons of statutory interpretation,¹¹ as well as on the views of the reporter of the 1964 commission, who had subsequently stated that "[i]t is not necessary, however, for the proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding."¹² The court embraced a similar (but not identical) rule, stating that "the determination to grant assistance turns not on whether the proceeding is pending but on whether the requested evidence will likely be of use in a judicial proceeding."¹³

Azar unsuccessfully argued that the statute demanded more, pointing to its requirement that the request for assistance come from "a foreign or international tribunal or upon the application of any interested person." Azar quoted 1964 legislative history that stated that the amendment to section 1782 extended judicial assistance by making it available to "international tribunals and litigants before such tribunals."¹⁴ He contended that this indicated that the Minister of Legal Affairs could not be an "interested person" unless he were an actual litigant.¹⁵

The court rejected this argument in a paragraph, relying on a different portion of the legislative history, which stated that a request for judicial assistance could come from "an interested party, *such as a person designated by or under a foreign law*, or a party to the foreign or international litigation."¹⁶ The court concluded that the congressional definition of an "interested person" therefore included a foreign government official such as the Minister of Legal Affairs. The court cautioned, however, that as between private parties, "a private individual may need to be a litigant in a pending proceeding in order to be an 'interested person.'"¹⁷

The court then decided that the Minister of Legal Affairs had satisfied its requirement that the requested evidence be of use in a judicial proceeding. The panel pointed to the facts that the documents were discoverable under the law of Trinidad and Tobago; that the Minister had requested production in a form that would ensure admissibility; and that he had stated why he wanted eventually to use the records in legal proceedings. On the basis of these indications, the court found that the district judge had correctly concluded that "a proceeding was probable and [had] properly assisted the Minister of Legal Affairs by ordering the production of the bank records."¹⁸

¹⁰ 848 F.2d at 1154.

¹¹ *Id.* at 1154-55.

¹² Smit, *supra* note 5, at 1026.

¹³ 848 F.2d at 1155.

¹⁴ S. REP. NO. 1580, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 3782, 3788 (Report of the Senate Judiciary Committee).

¹⁵ See 848 F.2d at 1155.

¹⁶ S. REP. NO. 1580, *supra* note 14, 1964 U.S. CODE CONG. & ADMIN. NEWS at 3789 (emphasis added).

¹⁷ 848 F.2d at 1155.

¹⁸ *Id.* at 1156.

* * * *

The Eleventh Circuit decision presents the issue of whether a foreign government official is an "interested person" under 28 U.S.C. §1782(a) as a straightforward question. The result seems much less clear in light of the minimal legislative history supplied by Congress. The most that a supporter of the opinion can find in that history is that Congress stated that an "interested party" should include "a person designated by or under a foreign law."¹⁹ However, whatever that means, it does not—without more—indicate that a government official engaged in a criminal investigation necessarily so qualifies.

The court in this case may well have been guided less by legislative history than by policy concerns regarding criminal investigations. The decision adapts the rules of judicial assistance to an era in which the international flow of funds has made it increasingly difficult to investigate violations of securities and exchange control laws.²⁰ Investigative agencies need access to financial records such as those involved in the *Azar* case not only ultimately to prosecute such violations, but also to determine at a preliminary stage who has violated the law and how. The court's decision thus aids law enforcement efforts by extending existing principles of international judicial assistance to encompass investigations of increasingly important criminal conduct.

At the same time, the decision may well create new practical difficulties. The "pending proceeding" requirement—whatever its failings—provides governments and courts with a bright-line rule that is easy to understand and administer. This clear rule is now replaced by a requirement that is less certain and susceptible to varying interpretations—that the evidence requested must likely be of use in a judicial or administrative proceeding.²¹ The facts in this case seem clear enough; however, it is not difficult to imagine other instances in which there is no more than a remote chance that any proceeding will ultimately ensue or that the requested evidence will ever be used as stated.

At a minimum, the Eleventh Circuit's new rule will function properly (and without abuse) only if district courts apply it with caution and more than modest scrutiny. In particular, the Eleventh Circuit wisely recognized this fact by stating that "a private individual may need to be a litigant in a pending proceeding in order to be an 'interested party' " within the meaning of the statute.²² In truth, one could go farther and state that, in the

¹⁹ S. REP. NO. 1580, *supra* note 14, 1964 U.S. CODE CONG. & ADMIN. NEWS at 3788.

²⁰ Moreover, a series of exchange control violations is sometimes involved in the financing of large-scale illegal drug transactions.

²¹ The court itself may have created some confusion in this regard. In its opinion it first described its test as one requiring that the requested evidence "be of use" in a proceeding (848 F.2d at 1155), but it then focused on whether the evidence would ultimately be used in such a proceeding (*id.* at 1156). The second test requires the court to assess the probability that there will be such a proceeding, whereas the first could be interpreted as requiring it to analyze solely the utility of the evidence should a proceeding go forward.

²² *Id.* at 1155.

absence of very sound reasons, a private party should not be able to obtain judicial assistance unless it first becomes a litigant in a pending proceeding. Counsel to private parties could otherwise be tempted to use this procedure to gain useful competitive information or conduct so-called fishing expeditions. Restricted to government investigations, the Eleventh Circuit's decision assists criminal investigations in an area where such help is needed. If it is extended to private parties, however, it may well become impossible to put this genie back in a bottle.

BRADFORD L. SMITH
Of the District of Columbia Bar

Jurisdiction—Foreign Sovereign Immunities Act—commercial activity exception—direct effect

ZEDAN v. KINGDOM OF SAUDI ARABIA. 849 F.2d 1511.
U.S. Court of Appeals, D.C. Cir., June 24, 1988.

Plaintiff Zedan, an American citizen, brought suit in the United States District Court for the District of Columbia against the Kingdom of Saudi Arabia for breach of a contract guaranteeing wages and profits. While performance under the contract occurred in Saudi Arabia, plaintiff alleged that the jurisdictional requirements under the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330, 1602–1611 (1982)) (FSIA) were satisfied by a recruitment call in California from a representative of the royal overseer of a private Saudi company. The district court granted the Saudi motion to dismiss. On appeal, the United States Court of Appeals for the District of Columbia Circuit (per Silberman, J.) unanimously affirmed and *held*: (1) that the telephone call did not have the requisite substantiality of contact with the United States; (2) that it was not sufficient to form the basis of a cause of action; and (3) that the alleged breach did not have sufficient direct effect in the United States to satisfy the exceptions to immunity under the FSIA.

Zedan apparently began work on the Riyadh Outer Ring Road in Saudi Arabia as an employee of the Arab Service Office. This entity, which Zedan did not allege to be an agency of the Saudi Government, sought his services through a representative of its royal overseer, Prince Sultan. Subsequently, Zedan entered into a 5-year employment contract with another private Saudi entity. When progress on the road lagged, the Saudi Ministry of Communications put Zedan in charge of the project and guaranteed payment of his salary and a share of the profits under his contract with the second private employer. The roadway was completed within 5 months and Zedan returned to the United States, allegedly without having been paid over \$600,000 in salary and profits by Saudi Arabia.

The court of appeals explained that the first clause of section 1605(a)(2) of the FSIA withholds immunity from a foreign state if the cause of action is "based upon a commercial activity carried on in the United States by the foreign state." Section 1603(e) defines such activity to require "substantial

contact with the United States." Zedan maintained that the recruitment telephone call satisfied the substantial contact test because an "unbroken connection" existed between that call and the alleged breach of the guarantee contract. The court noted that the substantial contact requirement of the FSIA is more rigorous than that suggested by a minimum contacts due process inquiry.¹ Here no part of the contract performance occurred in the United States. Relying on the legislative history of the FSIA, the court found the degree of contact "no more than that 'occasioned simply by U.S. citizenship or U.S. residence of the plaintiff.'" ² Finally, the court disposed of the plaintiff's position on the first clause by finding that the link between the recruitment of Zedan in the United States and the act in Saudi Arabia giving rise to his subsequent claim was not "based upon" the act in the United States and, consequently, was "too attenuated" to satisfy that FSIA requirement.³

The court next addressed Zedan's contention that jurisdiction was provided for under the second clause of section 1605(a)(2), which withholds sovereign immunity for an act "performed in the United States in connection with a commercial activity of the foreign state elsewhere." Judge Silberman proceeded to endorse for the first time since the FSIA's enactment the statement in the legislative history that "the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action."⁴ The court held that, since the suit was based upon a contract entered into and performed in Saudi Arabia, no alleged act or omission in the United States formed the basis of the cause of action.

Under the third clause of section 1605(a)(2), a foreign sovereign is subject to the jurisdiction of the United States when an act outside the territory of the United States in support of a commercial activity of the foreign state elsewhere causes a direct effect in the United States. Zedan argued that his financial destitution in the United States resulted from the failure of Saudi Arabia to honor its agreement and, therefore, constituted such a "direct effect." The court distinguished what it described as "financial hardship fortuitously suffered in the United States" by virtue of the "happenstance of [Zedan's] travel arrangements"⁵ from the required substantial and foreseeable direct effect of the alleged Saudi breach. The court emphasized that "something legally significant actually happened in the United States" in

¹ 849 F.2d 1511, 1513 (citing *Maritime Int'l Nominees Establishment v. Guinea*, 693 F.2d 1094, 1109 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983) (two business meetings in the United States between plaintiff and a representative of a foreign sovereign held not sufficient to satisfy the substantial contact test)).

² *Id.* (quoting H.R. REP. NO. 1487, 94th Cong., 2d Sess. 17 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6615-16)).

³ *Id.* at 1514: the court distinguished *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982) (allegation that defendants colluded in the United States to entice plaintiff to travel to Ireland where defendants stole his expertise and patent rights presents sufficiently "direct causal connection" to satisfy "based upon" requirement).

⁴ H.R. REP. NO. 1487, *supra* note 2, at 19.

⁵ 849 F.2d at 1514 (emphasis in original).

each of the other cases finding that the third clause was satisfied, both of which were suits by corporations that had incurred financial losses in the United States.⁶

The court also reasoned that Zedan's situation resembled the line of cases construing the direct effects of personal injuries that U.S. citizens have suffered abroad by virtue of acts or omissions of foreign states or their instrumentalities. These cases have uniformly held that there is no direct effect in the United States when the wrongful conduct occurred in the foreign state and the U.S. consequences are limited to those associated with physical rehabilitation in the United States.⁷ Here, Saudi Arabia's breach did not have a direct effect in the United States because the financial loss suffered by Zedan resulted from an intervening event—his return to the United States.⁸

* * * *

This case is a useful judicial refinement of the commercial activity exception to the FSIA and is noteworthy for its endorsement of the language in the House report narrowing the second clause, relating to acts in the United States connected with commercial activity abroad. In a potentially important footnote, Judge Silberman considers how the direct effect test would apply to an alleged breach of contract by a foreign sovereign calling for payment in the United States but involving performance wholly outside the United States. He states in dicta that breach of such a contract would have a substantial, direct and foreseeable effect in the United States only if it specified, "at the very least, . . . a particular location in the United States," and that it might have to set out "the particular bank through which payment was to be made."⁹

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Aliens—request for asylum on account of persecution—attribution of political opinion to refugee by persecuting government

DESIR v. ILCHERT. 840 F.2d 723.

U.S. Court of Appeals, 9th Cir., May 26, 1988.

Plaintiff, a Haitian seeking asylum in the United States, filed a petition for habeas corpus in the United States District Court for the Northern District

⁶ *Id.* at 1515 (citing *Transamerican S.S. v. Somali Democratic Republic*, 767 F.2d 998, 1004 (D.C. Cir. 1985) (detention of ship abroad, but demand for payment in the United States by agency of Somali Government and actual U.S. bank transfers sufficient to form basis for direct effect jurisdiction); and *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) (direct effect found from refusal to pay letters of credit issued by U.S. bank and payable in the United States to financially injured claimant)).

⁷ See, e.g., *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415, 418 (5th Cir. 1987) (citing cases), *cert. denied*, 108 S.Ct. 775 (1988).

⁸ 849 F.2d at 1515 (citing *Upton v. Empire of Iran*, 459 F.Supp. 264, 266 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979)).

⁹ *Id.* n.2.

of California, to overturn a denial of asylum by both an immigration judge and the Board of Immigration Appeals (BIA). The plaintiff sought asylum under section 101(a)(42)(A) of the Immigration and Nationality Act (8 U.S.C. §1101(a)(42)(A) (1982)) (INA) on the basis of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." The district court upheld the BIA decision, which allowed deportation of the plaintiff because the incidents of persecution in Haiti were economically rather than politically motivated. The Court of Appeals for the Ninth Circuit (per Tang, J.) reversed, *holding* that the plaintiff had demonstrated persecution based on political opinion by showing a pattern of extortion by government officials, and remanded for a determination of whether the plaintiff would be persecuted upon his return to Haiti.¹

The court of appeals first noted that an alien must satisfy both an objective and a subjective component of the test for fear of persecution. To satisfy the subjective prong, the alien must prove that he or she actually fears persecution. To satisfy the objective prong of the asylum test, the alien must create a record that includes "credible, direct and specific evidence" that establishes that persecution is a "reasonable possibility."²

The factual record developed before the immigration judge revealed that the plaintiff had been periodically beaten by the Haitian security forces, the Ton Ton Macoutes, because of his refusal to pay bribes for the privilege of fishing and selling curios to tourists. The plaintiff produced undisputed evidence that the Haitian security forces branded anyone resisting extortion as a political subversive. The immigration judge, the Board of Immigration Appeals and the district court accepted the plaintiff's portrayal of the facts as accurate. Yet, without exception, they held that the plaintiff's nonpayment of extortion did not spring from political motives but rather from economic motivation such as inability to pay. Further, the BIA found that the plaintiff had failed to show that the security forces interpreted his nonpayment of the bribes as politically motivated.

The court of appeals rejected this rationale and held that, in applying the asylum test, the motives and perspective of the persecutor—the Macoutes—are at least as important as those of the persecuted. Noting that the Haitian Government of deposed President Duvalier operated as "government by thievery," the court found that the former Government had established a security system that fostered corruption, extortion and violence. For most of the Ton Ton Macoutes, their sole source of income was extortion from ordinary Haitians. The court concluded that this system of extortion and terror directly benefited the Duvalier Government and that the Macoutes were an "organization created for political purposes."³

¹ The court took judicial notice of President Duvalier's flight from Haiti on February 6, 1986, and the disbanding by the successor Government of the security forces, the Ton Ton Macoutes, that had persecuted the plaintiff.

² 840 F.2d 723, 726.

³ *Id.* at 727 (quoting *Haitian Refugees Center v. Civiletti*, 503 F.Supp. 442, 498–500 (S.D. Fla. 1980), *aff'd as modified sub nom.* *Haitian Refugees Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982)).

The court characterized the plaintiff's refusal to accede to extortion as "more than arbitrary, personal actions." Rather, his refusal was the manifestation of a political opinion because it "resulted in his classification and treatment as a subversive."⁴ An alien may have a legitimate claim to political persecution or fear of political persecution, the court found, as long as the relevant government regards political opinion as motivating the alien's actions. As the court added, "whether the political opinion is actually held or implied makes little difference where the alien's life is equally at risk."⁵ Nonpayment of bribes to the Macoutes was a "political choice" in Duvalier's Haiti.

The court remanded for a determination of whether, in view of the changes in the Haitian Government, plaintiff now faces a clear probability of persecution should he be returned to Haiti. Plaintiff will have the opportunity to show his likely treatment in post-Duvalier Haiti.

* * * *

Desir v. Ilchert continues the trend in the Ninth Circuit toward finding political persecution on the basis of imputed political opinions.⁶ It remains to be seen whether other circuits will follow this lead. The court of appeals correctly focused on whether the source of the persecution, i.e., the government security forces or other government actors, views the victim's actions as politically motivated. A citizen living under an oppressive regime may engage in conduct the local authorities regard as antigovernmental and that citizen may also intentionally avoid any overt expression of political motive in order to remain safe from persecution. Persecution may nonetheless be visited upon such a silent party on the basis of a supposed political opinion. It seems logical that in such cases the result under the "well-founded fear of persecution" standard should be no more restrictive than if the victim actually held and expressed political opinions. Indeed, this silent victim may be entitled to greater solicitude under the asylum test if persecuted by a regime with the characteristics that the court found to exist in Haiti under President Duvalier.

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⁴ *Id.* at 727-28.

⁶ The court discussed a number of relevant precedents, e.g., *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1985) (refusal of former member of right-wing party and military groups to join guerrillas in El Salvador was conscious choice to remain politically neutral and constituted political opinion); *Argueta v. INS*, 759 F.2d 1395 (9th Cir. 1985) (death threat based on persecutors' erroneous belief that alien was member of guerrilla organization, coupled with affirmative choice to remain politically neutral, sufficient to establish clear probability of persecution based on political opinion); *Del Valle v. INS*, 776 F.2d 1407 (9th Cir. 1985) (refusal to join "death squad" and pursuit of studies and other community activities constituted choice to remain neutral and expression of political opinion under the Immigration and Nationality Act); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985) (alien's actual political view, whether neutral or partisan, irrelevant; where government attributed certain political opinions to him, this constituted persecution on account of political opinion); *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (alien persecuted because of political opinion imputed by persecutor).

Treaties—Agreement Between the United States and the United Nations Regarding UN Headquarters—reconciliation of provisions of U.S. statutes and treaties—congressional intent

UNITED STATES v. PALESTINE LIBERATION ORGANIZATION. No. 88 Civ. 1962 (ELP).

U.S. District Court, S.D.N.Y., June 29, 1988.

Plaintiff, the United States, brought an action in the U.S. District Court for the Southern District of New York against the Palestine Liberation Organization (PLO) and four individuals¹ seeking an injunction to close the PLO's Permanent Observer Mission (Mission) to the United Nations as violative of the Anti-Terrorism Act of 1987 (ATA).² The district court (per Palmieri, J.) entered summary judgment for defendants and *held*: (1) the ATA does not require the closure of the PLO's Mission to the United Nations; (2) the status of the PLO's Mission, an invitee of the United Nations, is protected by the Agreement Between the United States and the United Nations Regarding the Headquarters of the United Nations (Headquarters Agreement);³ and (3) Congress did not intend the ATA to supersede the Headquarters Agreement.

The court first determined that it had jurisdiction over the case. In this regard, defendants had the requisite minimum contacts with the forum state, consistent with the requirements of due process under *International Shoe Co. v. Washington*,⁴ to permit the court to assert personal jurisdiction over them. The PLO finances and maintains an office and telephone listing in New York and each of the individual defendants employed at the PLO's Mission maintains a "continuous presence" in New York. The PLO neither has nor claims the benefits of diplomatic immunity.

The court also concluded that it had subject matter jurisdiction over the dispute, finding that both the interpretation of the ATA as a matter of domestic law and reconciliation of the ATA with the international obligations of the United States are matters that fall within the mandate of the federal courts. The court rejected the argument of defendants that section 21 of the Headquarters Agreement provides a "rule of decision" that requires the United States to arbitrate disputes involving interpretations of the Headquarters Agreement, depriving the court of subject matter jurisdiction.⁵

¹ Individual defendants included the Permanent Observer of the PLO, who possesses an Algerian passport but whose citizenship is not divulged; the Deputy Permanent Observer of the PLO, a United States citizen; the Alternate Permanent Observer of the PLO, an Iraqi citizen; and an administrator at the Mission, a citizen of Great Britain.

² Foreign Relations Authorization Act for Fiscal Years 1988-1989, tit. X, Pub. L. No. 100-204, §1001, 101 Stat. 1331, 1406 (codified at 22 U.S.C.A. §§5201-5203 (West Supp. 1988)).

³ June 26, 1947, 61 Stat. 3416, TIAS No. 1676, 11 UNTS 11, *authorized by* S.J. Res. 144, 80th Cong., 1st Sess., *set out in* 22 U.S.C. §287 note (1982).

⁴ 326 U.S. 310, 320 (1945).

⁵ Section 21(a) of the Headquarters Agreement, *supra* note 3, provides, in pertinent part: "Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by

First, the court found section 21 inapplicable on its face because its arbitration provisions govern disputes solely between the United Nations and the United States. The court pointed out that the United Nations had explicitly refrained from becoming a party to this litigation.⁶ Second, the court concluded that it would exceed its constitutional powers granted under Article III if it ordered the United States to submit to arbitration. The manner in which the United States honored its treaty obligations and, in particular, whether to submit to the jurisdiction of an international tribunal, constituted a nonjusticiable "political question" within the purview of the executive branch. The court relied on a long line of cases, spanning nearly a century, that rejected jurisdiction over matters involving international obligations.⁷

The court then considered the central issue in the case—whether the ATA required the closure of the PLO Mission to the United Nations. The court described the United Nations headquarters in New York as an "international enclave"⁸ and summarized provisions of the Headquarters Agreement that guarantee appropriate transit, entry and access to the facility. Section 11 of the Headquarters Agreement bars the United States from "impos[ing] any impediments to transit to or from the headquarters district" of persons invited to the headquarters by the United Nations on official business.⁹

The United Nations, from its incipency, has invited various nonmember groups to participate in its proceedings and maintain "Permanent Observer Missions," including nonmember nations, intergovernmental organizations and other organizations, such as the PLO. For nearly 40 years, the United States has acquiesced in the presence of such observer missions and has refrained from impeding their function. The Department of State has never

negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators"

⁶ The court also rejected the argument of defendants that it should defer to an advisory opinion of the International Court of Justice finding a dispute between the United States and the United Nations subject to arbitration under section 21. Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 ICJ REP. 12 (Advisory Opinion of Apr. 26), *reprinted in* 27 ILM 808 (1988). The Secretary-General argued before the ICJ that a dispute within the meaning of section 21 existed upon enactment of the ATA, in the absence of adequate assurances from the United States that the ATA would not affect the status of the PLO Mission. The United States argued that arbitration would not be "appropriate or timely" because it pledged not to take any action to close the Mission pending the outcome of the district court litigation. The ICJ agreed with the Secretary-General, finding that the United States had taken measures against the PLO Mission that could not be reconciled with the position of the Secretary-General. The ICJ also noted that the United Nations had not agreed to settle this dispute in U.S. court and had restricted its role in the district court suit to *amicus curiae*.

⁷ See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 996-97 (1979) (vacating, with instructions to dismiss, an attack on the President's action terminating a treaty with Taiwan); *Clark v. Allen*, 331 U.S. 503, 509 (1947) (President and Senate may denounce a treaty and thus terminate its life); *Chae Chan Ping v. United States*, 130 U.S. 581, 602 (1889) (whether government can disregard an engagement with another nation is not for determination by the courts).

⁸ No. 88 Civ. 1962 (ELP), slip op. at 3.

⁹ Headquarters Agreement, *supra* note 3, §11.

disputed that this right of access includes maintenance of an office in which to organize and carry out official United Nations business.

In 1974 the United Nations invited the PLO "to participate in the sessions and the work of the General Assembly in the capacity of observer."¹⁰ That same year, a U.S. district court dismissed a suit challenging the presence of a PLO representative in New York pursuant to that invitation, holding that "[t]his problem must be viewed in the context of the special responsibility which the United States has to provide access to the United Nations under the Headquarters Agreement."¹¹ The State Department took the position in that case that the Headquarters Agreement required the United States to provide access for the PLO. Since 1974, the PLO has functioned without interruption as a permanent observer to the United Nations and the United States has acted in a manner consistent with recognizing the PLO's rights as an invitee.

The ATA, which became effective on March 21, 1988, declares that the PLO is a "terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States."¹² The ATA, *inter alia*, forbids the establishment or maintenance of "an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by" the PLO, if the purpose is to further the PLO's interests.¹³

The court recognized that both statutes and treaties constituted the supreme law of the land and that the court must reconcile conflicts between them by giving effect to both wherever possible. The court, however, could not reconcile the ATA and the Headquarters Agreement insofar as they affected the status of the PLO Mission. When such a conflict cannot be resolved, a court may find that a later enacted statute such as the ATA takes precedence over an existing treaty obligation only if Congress "clearly and unequivocally" stated its intent to do so. The court cited considerable precedent for the proposition that, in the absence of such explicit congressional intent, the court must interpret the statute at issue in a manner consistent with existing treaty obligations.¹⁴

The court held that the ATA did not apply to the PLO Mission because Congress, in enacting the legislation, did not evince a clear and unequivocal intent to supersede the Headquarters Agreement. First, Congress did not mention either the PLO Mission or the Headquarters Agreement in the ATA. The court found the absence of specific references to the Mission and Headquarters Agreement in the ATA particularly significant because, prior to passage of the statute, the State Department had informed Congress of its

¹⁰ GA Res. 3237, 29 UN GAOR Supp. (No. 31) at 4, UN Doc. A/9631 (1974).

¹¹ *Anti-Defamation League of B'nai B'rith v. Kissinger*, Civ. No. 74 C 1545, slip op. at 37 (E.D.N.Y. Nov. 1, 1974), *excerpted in* 1974 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 27, 28, *quoted in* PLO, slip op. at 6.

¹² 22 U.S.C.A. §5201(b) (West Supp. 1988).

¹³ *Id.* §5202(3).

¹⁴ *See, e.g., Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Chew Heong v. United States*, 112 U.S. 536, 602 (1884).

view that closure of the PLO Mission would be inconsistent with the obligations of the United States under the Headquarters Agreement.¹⁵ Second, the ATA's provisions prohibiting maintenance of a PLO office applied "notwithstanding any provision of *law* to the contrary," but did not purport to apply notwithstanding any *treaty*.¹⁶ Third, a review of the legislative history of the ATA indicated that no member of Congress had expressed a clear and unequivocal intent to supersede the Headquarters Agreement. The only debate on the issue focused on whether the United States had an obligation to provide access to the PLO, and every proponent of the ATA argued, under a misapprehension, that no such obligation existed under the Headquarters Agreement.

Although the court held that the ATA did not apply to the PLO Mission, it rejected the position of defendants that it strike the statute in its entirety. The court found that the statute remained a valid enactment of general application that restricted PLO activity within the United States, aside from the Mission.¹⁷

* * * *

On August 29, 1988, the United States announced it would not appeal the decision by the district court "in light of foreign policy considerations including the U.S. role as host to the United Nations Organization."¹⁸ A possible ground for appeal by the United States would have been the district court's interpretation of the intent of Congress in enacting the ATA. The opinion recognizes that members of Congress expected that the ATA would lead to the closing of the PLO Mission and knew throughout their deliberations that the ATA posed a potential conflict with the Headquarters Agreement. The court of appeals, however, would have needed to find that the district court's careful and convincing review of the legislative history was erroneous in order to reverse the decision. Such an outcome would have been unlikely because Congress, if it wished, could reenact the ATA with a clear statement of intent. According to press accounts, the President personally resolved the issue of whether to appeal on the basis of the Secretary

¹⁵ The court afforded "great weight" to the views of the executive branch in reaching its conclusion. The United Nations Secretariat and General Assembly also opined that the Headquarters Agreement protected the PLO Mission, and the court afforded these views "some weight," particularly because the UN position was consistent with that of the State Department. Slip op. at 26.

¹⁶ 22 U.S.C.A. §5202(3) (West Supp. 1988) (emphasis added). Other parts of the Foreign Relations Authorization Act, of which the ATA was a part, specifically superseded treaty obligations and referred to "United States law (including any treaty)." 101 Stat. at 1343. See slip op. at 29.

¹⁷ In a related case, Judge Palmieri construed the ATA as not prohibiting the opening of an information office to gather, write and disseminate materials on the subject of the Palestinian people, so long as such office did not accept any money from the PLO or purport to act in any kind of official capacity for the PLO. The court also held that the ATA, as narrowed, did not violate the First Amendment or bill of attainder clause of the U.S. Constitution. *Mendelsohn v. Meese*, No. 88 Civ. 2005 (ELP) (S.D.N.Y. June 29, 1988).

¹⁸ N.Y. Times, Aug. 30, 1988, at A1, col. 8 (Justice Department statement).

of State's emphasis on foreign policy considerations, thereby overriding the Justice Department's views on proper construction of the ATA.

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Sovereign immunity—international organizations—act of state doctrine—recognition of foreign laws—arbitration clauses

INTERNATIONAL TIN COUNCIL v. AMALGAMET INC. 524 N.Y.S.2d 971.
Supreme Court, New York County, January 25, 1988.

Petitioner, International Tin Council (ITC), brought an action to stay an American Arbitration Association arbitration that was initiated by respondent, Amalgamet Inc., and that arose out of petitioner's refusal to honor three contracts for the purchase of tin from respondent. Petitioner claimed that it was immune from suit in the United States by virtue of its status as an international organization under British law, and, in the alternative, that the arbitration clause in its contract with respondent was unenforceable. The Supreme Court of New York County (per Parness, J.) dismissed the petition, and *held* that petitioner lacked any basis under U.S. law for immunity from legal process and that petitioner had consented to the arbitration clause providing for arbitration in New York.

This case arose out of the October 1985 collapse of the world's tin market.¹ The International Tin Council, formed in 1960 and consisting of 22 member countries that consume or produce tin,² had entered into numerous contracts for tin and tin futures aimed at ensuring the worldwide availability of tin at stable prices.³ ITC had agreed to purchase tin from Amalgamet at the high, precollapse prices, but refused to complete three purchases at those prices after the collapse reduced prices by over half. Amalgamet sought to enforce its claim for damages by demanding an arbitration pursuant to the arbitration clause found in each sale confirmation form, and ITC petitioned for a stay of the arbitration.

In considering ITC's arguments that it was immune from legal process and suit under U.S. law, the court analyzed and rejected four potential bases for immunity. First, the court found inapplicable the Foreign Sovereign Immunities Act (28 U.S.C. §§1330, 1602-1611 (1982)) (FSIA), since the FSIA covers foreign states and their instrumentalities, but not international organizations.⁴ Second, the court reviewed the International Organizations

¹ See generally McFadden, *The Collapse of Tin: Restructuring a Failed Commodity Agreement*, 80 AJIL 811 (1986). The events of 1985 resulted in numerous civil cases in England regarding ITC contracts. See, e.g., *Shearson Lehman Bros. v. Maclaine Watson & Co.*, [1988] 1 W.L.R. 16; *Maclaine Watson & Co. v. International Tin Council*, [1987] 2 All E.R. 787; *Standard Chartered Bank v. International Trade Council*, [1986] 3 All E.R. 257.

² The ITC was created pursuant to Article IV of the Second International Tin Agreement, Sept. 1, 1960, 403 UNTS 3, "to administer the provisions and to supervise the operation" of the Agreement.

³ See *id.*, Art. I (objectives of Second International Tin Agreement).

⁴ The FSIA defines a "foreign state" as including "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." An agency or instrumentality of a foreign state must be a separate legal person, an organ of a foreign state or political subdivision thereof or

Immunities Act (22 U.S.C. §288 (1982)) (IOIA), but noted that the ITC met neither of the two criteria for international organizations specified in the Act.⁵ Third, the court considered the argument of ITC that its refusal to purchase Amalgamet's tin was an act of state. The court stated that the act of state doctrine concerns "certain international disputes . . . [that] should be resolved by the executive branch of the United States government rather than by the courts," adding that the doctrine "is involved where the dispute is intrinsically involved with some sovereign function of a foreign entity so that political as well as purely private commercial issues are implicated."⁶ Citing several cases, the court stated that the act of state doctrine does not apply to purely commercial transactions.⁷ It went on to conclude that ITC had failed to demonstrate how any sovereign rights would be sacrificed during a New York arbitration, especially given that the 1972 UK-ITC Headquarters Agreement⁸ and the British law on the ITC's status⁹ would permit an arbitration in England by a British corporation asserting a similar claim.

The court also found that general principles of comity could not form a sufficient basis for immunity in this case. The court asked whether it "should recognize under principles of international comity a law of the U.K. which grants immunity to a U.K. resident from a suit in contract but to none other."¹⁰ The court again reviewed the Headquarters Agreement, noting that it was meant to provide immunity only within British territory; it allows suits to enforce arbitrations, and it requires ITC's contracts to contain arbitration clauses.¹¹ In refusing to find that comity required giving the British law extraterritorial effect, the court found it "presumptuous to suggest . . . that a U.S. court as a matter of comity deprive a U.S. corporation of the right to enforce a claim against ITC in the U.S., where the U.K. would permit same to be brought by its own citizens against ITC in the U.K."¹² The court added that, in any event, the arbitration clause in the confirmation form, by providing for settlement of disputes by arbitration in

owned by such a state or subdivision, and neither a U.S. citizen nor created under the laws of a third country. 28 U.S.C. §1603(a)-(b) (1982). *Cf. International Ass'n of Machinists v. OPEC*, 477 F.Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (dismissing suit against OPEC members under FSIA when defendants were individual nations, but not OPEC as an organization, which had not been properly served).

⁵ Section 1 of the IOIA defines an international organization as:

a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter.

⁶ 524 N.Y.S.2d 971, 974.

⁷ *Id.*

⁸ Headquarters Agreement, Feb. 9, 1972, United Kingdom-International Tin Council, 834 UNTS 287. *See also infra* note 11.

⁹ International Tin Council (Immunities and Privileges) Order, S.I. 1972, No. 120.

¹⁰ 524 N.Y.S.2d at 975.

¹¹ Headquarters Agreement, *supra* note 8, Arts. 8, 23, 24 and 28.

¹² 524 N.Y.S.2d at 975.

New York, constituted a waiver of any immunity ITC might enjoy from U.S. jurisdiction.

The remainder of the court's opinion focused on ITC's argument that ITC was not bound by the arbitration clause in the sale confirmation form because it had not consented to the inclusion of the clause. First, the court rejected ITC's argument that the arbitration clause constituted an unconsented oral addition to the confirmation form, noting that the executed written confirmation letter used in over 35 previous transactions was the sole contract to govern these purchases. Second, the court quickly dismissed ITC's claim that the arbitration clause was hidden in the confirmation form, pointing to its prominent location on the form, the size and number of prior sales using the same clause, and the experience and sophistication of the parties to the contract.

* * * *

The New York court's decision is of marginal value in the rules it sets down for the immunity of international organizations from suits in U.S. courts. Although its dismissal of the applicability of the FSIA and IOIA to the ITC is obviously correct, its examination of the act of state doctrine is seriously flawed. First and most important, the act of state doctrine does not apply in this case, because the ITC is not a foreign sovereign. The doctrine pertains only to the governmental acts of a foreign state.¹³ Second, this court, like others, discusses immunity and act of state interchangeably, neglecting to consider that the former is a jurisdictional defense based on international law while the latter is an affirmative defense containing elements of U.S. constitutional law, conflict of laws and comity. Its citation to a sovereign immunity case that analyzed the commercial activity exception to the FSIA (28 U.S.C. §1605(A)(2) (1982)), to demonstrate that the act of state doctrine is applicable in a purely commercial context,¹⁴ is thus inappropriate. A better approach might thus have pointed out that ITC's activities can never be acts of state and, moreover, that default on a contract, regardless of its commercial nature, is not the type of conduct to which the act of state doctrine was meant to apply.¹⁵

The court's analysis of comity proves much more logical. The court applies a rule of reason in determining whether respect for foreign law requires holding ITC immune from suit in the United States. By emphasizing that ITC would be subject to suit in the United Kingdom under British law, the court can easily and sensibly hold that permitting a similar suit in New

¹³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §443 (1987).

¹⁴ *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

¹⁵ *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694-95 (1976). The commercial nature of the default of the instant case could have been considered an additional basis for rejecting the act of state doctrine, based on the plurality opinion in *Dunhill*, *id.* at 695-706 (opinion of White, J.).

York shows no disrespect for British law and thus cannot violate notions of comity. The court's conclusion—that an international organization of which the United States is not a member and that is based in another country is not immune from the application of U.S. law—is consistent with notions of comity, as well as with customary international law and the intent of Congress in enacting the International Organizations Immunity Act.¹⁶

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¹⁶ See RESTATEMENT (THIRD), *supra* note 13, §467 comments *a* and *f* and Reporters' Note 1.

* These views are those of the author and not necessarily those of the United States Government.

BOOK REVIEWS AND NOTES

EDITED BY DETLEV VAGTS

Recueil des Cours de l'Académie de Droit International de La Haye, 1983. 5 vols. (Vols. 179, 180, 181, 182 and 183 of the collection.) The Hague, Boston, London; Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers. Vol. I, 1984: pp. 412; vol. II, 1984: pp. 411; vol. III, 1984: pp. 409; vol. IV, 1984: pp. 469; vol. V, 1985: pp. 382.

The general course in 1983 was given by Professor Michel Virally (University of Law, Economy and Social Sciences of Paris). It constitutes the entire volume V (vol. 183 of the collection) and is titled *Panorama du droit international contemporain*.

Virally defines international law as a legal order, comparable to municipal legal orders, governing international society. He sees contemporary international law as differing from classical international law by replacing the older emphasis on political manipulation and the rigidity of obligations, particularly contained in treaties, with a bias toward change in directions determined ideologically. Three major contributors to channeling the ideological trends into conceptions of law are the Soviet Revolution of 1917, the decolonization of political groups seeking to justify their recent history and ambitions in terms of collective "peoples'" rights (*droits des peuples*), as distinguished from individual rights (*droits des hommes*), and the emergence of international public opinion as a major influence on state behavior.

Nonetheless, Virally holds the state still to be the key conception of the international legal and political orders. He defines the state by its effects rather than by natural law characteristics. It is the unit, however composed, that governs itself in the society of other such units; the fundamental conception is structured authority based on control of territory ("*un pouvoir institutionnalisé . . . [qui] se présente donc fondamentalement comme un pouvoir territorial, dépendant de la maîtrise du territoire*") (p. 48). It is created by the processes of history and politics in fact, but is brought into the international legal order by recognition. Virally characterizes recognition as unilateral by the recognizing state, juridical in that it has legal consequences desired by that state and totally discretionary (pp. 52-53). His overall conception thus seems to be mainstream modern positivism.

Troubles arise, however, in considering whether the "droit des peuples" to independence and self-governance has in recent years created a legal right to "recognition" as a state, at least when the facts that would justify such acceptance exist; whether "recognition" is legally as discretionary as first stated. Virally concludes his very clear and learned analysis of this point by finding that the rights of "peoples" involve rights of states under the existing international legal order, including the right to determine their

own constitutions (pp. 65–66). Thus, he implies that state practice and practical political considerations are moving to minimize the legal effect of *de jure* labels attached at the discretion of third states; that those considerations bring about legal results based on a recognition implied by actions in disregard of the legal labels attached by policy in disregard of law. Furthermore, the impact of Article 73 of the UN Charter and its elaboration in various General Assembly resolutions has been to create a distinction in law between ethnic enclaves and political units in the Third World; i.e., between, on the one hand, Biafra, Katanga and the Kurdish areas, *inter alia*, and, on the other hand, former colonies of Western states. The latter have achieved a degree of international status by positive law; the former have not and must achieve statehood by other means, if they want it. In any case, in practice, the “*droit des peuples*” has been confined to victims of colonialism (pp. 69–70), and the concept of colonialism seems to have been confined to European and North American actions, presumably counting South Africa as a European state.

Turning to the concept of the state in international law, Virally regards the word as implying various legal results such as the capacity within the international legal order to conduct external relations. The principles involved are created by custom and the evolution of practice; they are to some degree codified in the UN Charter, various resolutions of the General Assembly and such frankly political accords as the Final Act of the Helsinki Conference of 1975.

To Virally, the state is the only unit of the international legal order whose rights and obligations are complete (p. 72). This leads to a discussion of those rights and obligations, which Virally relates to the legal word “sovereignty,” a concept he finds defined within the system, but with a variable content. These rights include the exclusive authority of the state to make and enforce municipal law within its own territory (subject to some limits imposed and constantly modified by the international legal order) and the right to determine its internal and external policies for itself. The first section closes with a few pages devoted to the concept of equality under the law as an aspect of state sovereignty, noting that sovereign equality implies equality of rights derived from the fact of sovereignty, thus full reciprocity in reciprocal situations, and, most interestingly, a principle of unequal treatment for unequal situations. This last then becomes the basis for special rights of geographically disadvantaged and nonindustrialized states. It is not clear why he thinks these “rights” are legal and not merely moral or political.

There is a pedagogical problem with Virally’s approach. It is full of self-references; limitations on the rights of states are said to exist in the system, and each explication is referred back to a general concept of the undefined “legal order.” Thus, whatever its utility as a positivist model of the legal order itself, the approach seems very hard on students. On the other hand, failure to make the constant back-references would result in generalities that are clearly incorrect, or so laden with specific qualifications as to be incomprehensible. It is quite likely that what seems a sophisticated model to

modern positivists will be useless to students who have not yet organized their thinking to be able to criticize any particular model of the international legal order and to scholars who find modern positivism a closed system, not responsive to the demands of natural justice and other values they believe implicit in the concept of "law."

The next section explores in more detail the authority (*pouvoirs*, legal powers) of the state in the international legal order. Here the differences between the categorizations and vocabularies of civil lawyers and common lawyers begin to play a role of some significance. Virally is, of course, a French-trained civil lawyer. Thus, he begins by addressing the "titres de compétence" of the state, what we common lawyers might call the scope of legislative jurisdiction. The basic rules are territoriality and nationality, subject to exemptions based on treaty and general international law, such as the exemptions from territorial jurisdiction usually enjoyed by visiting foreign forces and diplomats. Then he reverses the usual formulation by suggesting that conflict-of-laws theory provides a kind of foreign application of national laws, subject to the obstacles to that application that might be a product of the foreign forum in which those laws are sought to be enforced.

In addition, he finds some bases in principle for the direct extensions of national law to nationals' property sited abroad and the acts of foreigners abroad. In this last regard, Virally repeats the usual nonsense about piracy being subject to universal jurisdiction without regard to the ingrained rules of standing, and treats the "codification" of the 1958 and 1982 law of the sea conventions as if it meant something. He also asserts, without discussion, that states have the authority to protect themselves by applying their criminal law to acts of foreigners abroad that threaten their vital interests, citing espionage as an example, as well as the more often-cited counterfeiting, immigration and customs laws. Oddly, he singles out the United States with regard to customs and immigration laws, as if those were legally doubtful extensions of prescriptive jurisdiction, and does not cite American adherence to contiguous zone treaties, which fix territorial limits to the extensions of enforcement jurisdiction for customs and immigration. He gives no examples of the overseas application of espionage laws to foreigners. On the other hand, he properly cites the United States as the principal proponent of expanded prescriptive jurisdiction on the basis of "effects" on various legally protected interests. He also notes that the American assertions seem to many to be excessive, that the "rule of reason" and "balance of interests" approaches are self-judging revivals of discredited earlier attempts to justify using national discretion as a basis for ignoring foreign interests, and that a number of countries have enacted blocking statutes to prevent the exercise of "effects doctrine" jurisdiction against persons in their territory. In the main, what seems to be lacking in this extraordinarily compact and sophisticated exposition is the support in depth for various propositions that are not self-evident, although, in a sense, they flow from Virally's fundamental premises. Having introduced conflict of laws in its choice-of-law phase as a type of extraterritorial jurisdiction, Virally assumes there are public law underpinnings for that prescriptive jurisdiction. What is lacking is a clear

differentiation among prescriptive, enforcement and adjudicatory jurisdiction, and, to introduce a concept adverted to three times by the International Court of Justice and generally ignored by publicists, the relationship of all three phases of jurisdiction to *jus standi*.

Moving on to more forceful types of intervention, Virally notes the major positive documents and the inconsistent practice, ending with a discussion of minimum standards of justice and human rights. Again, the presentation is highly compressed, extremely clear and well organized, subtle and realistic. For example, in discussing assistance to an established government as possible "intervention," he points out that assistance is rendered legally by one state to another state, but when the requesting "government" reflects more the will of the invitee than of the people it is nominally governing, the legality of the "assistance" has been properly questioned.

Part I of the course concludes with a discussion of territory, including the law of the sea, airspace and outer space.

Part II is devoted to even more theoretical considerations and their practical implications: the lawmaking processes of the international legal order. Again, the text is so packed with insight and so tightly organized that a mere description would be nearly as long as the text itself. Once more, Virally places himself above the technical disputes, pointing out, for example, that the phrase *jus cogens* has been accepted in the Vienna Convention on the Law of Treaties, but that its actual content, if it has any, has not been agreed on. Again, there are points on which it is possible to wish for fuller analysis. For example, the word "comity" is identified with mere courtesy, "*observé pour des raisons diverses, mais non juridiques*" (p. 132); an assertion that would not surprise most American jurists, but would greatly surprise Lord Mansfield, who first used the term in its current sense, and Latinists who know that it relates to obligations that derive from membership in the community, much as modern naturalist jurists derive legal obligations from the basic structure of international society.¹

The third and last part of Virally's course is devoted to what Wolfgang Friedmann called the law of cooperation: international organizations and problems of authority, "soft law [*droit doux*]" and even cooperation to maintain the peace. Again, the compact organization of the course prevents setting forth the detailed outline that those not fortunate enough to have access to the book would want. This time I must resist the temptation to try.

In a final chapter, Virally finds the talk of a revolution in the structure of the international legal order or its fundamental rules to be greatly exaggerated. The expansion of the community has changed its politics substantially, and the demand for changed rules of substance cannot be ignored, but the

¹ The word appears to have entered the common law via a Latin phrase used by Mansfield in holding the law of the place of contracting to be the proper law of the contract "*ex comitate et jure gentium*." *Robinson v. Bland*, [1760] 2 Burrow 1077. "*Jure gentium*" at that time referred to a hypothesized universal substantive law whose traces still survive in modern admiralty law, but whose utility was undermined and whose supposed rules have been, in the main, superseded by the evolution of conflict-of-laws theory. This is not the place for a fuller analysis.

lawmaking process has not changed fundamentally. That raises yet another problem. The need for clarity and definitiveness in some substantive rules is dictated not by political pressures alone, but by changed technology, which has opened up new areas, such as outer space and the deep seabed, for human interaction. The basic problem is that lawmaking is a political process, and nobody is prepared to accept the assertions of others as legally binding. To some degree, the problem has been alleviated by the proliferation of international organizations with some lawmaking capacities, structured to provide their members with safeguards of their essential interests even if that means crippling the organizations' capacity to make law for all. But there is room for optimism when it is seen that the "areas of turbulence" are at the edges of the massive movements of international society, and that in the vital areas of international commerce and economic relations in general, the law is developing in an orderly fashion and doing its job.

It is patently impossible in a review to describe adequately a course as deep as this, as well written, as brilliantly organized and as comprehensive. Every paragraph embodies variations on the basic positivist model that raise questions too subtle to be answered in a general course; to criticize it, as I have done, for what appear to be unavoidable gaps or inconsistencies in the form of the course is as unfair to Virally as the failure to criticize would be to the readers of this *Journal*.

Julio A. Barberis (Catholic University of Buenos Aires) addressed *Nouvelles Questions concernant la personnalité juridique internationale*. Because "law" is an abstract conception built upon words, every legal term, including "international juridical personality," rests on definitions that derive their meaning from contexts and traditions that cannot be directly communicated but that each analyst defines for himself and tries to communicate by words to others. Two positivist definitions of "subject of international law" are set out: Kelsen's "pure theory" definition, which depends upon determining what "the law" defines as its subjects, i.e., to whom or what it addresses itself; and the "theory of responsibility" urged primarily by Eustathiades and Wengler, under which the term "subjects" properly applies only to those whose violations of norms the law punishes. The difference seems subtle, but could have major effects on the consideration of the legal status of such asserted "subjects" of the law as individuals and national liberation movements. Barberis prefers something in between: "subjects" of international law are those whose conduct is envisaged by the law directly and effectively as containing a right or an obligation.² He amusingly analogizes the distinction between the positivist and naturalist definitions of subject of the law to the realm of zoology, pointing out that the animal kingdom viewed objectively does not create natural distinctions between whales and ungulates among mammals, however useful those distinctions might be to zoologists. So the Holy See, as party to a bilateral treaty, is a subject of

² "En conséquence . . . l'on peut définir le sujet du droit international comme étant celui dont la conduite est prévue directement et effectivement par le droit des gens en tant que contenu d'un droit ou d'une obligation" (p. 168).

international law whatever its objective characteristics. This view leads quickly to a rejection of various hypothetical naturalist positions under which special subcategories of international law have been posited, such as, among others, a special law of international organizations, a humanitarian law of war applicable directly to individuals and a law of international transactions between governmental and private commercial parties. In this last area there is considerable controversy, and Barberis notes that some jurists posit the existence of a *lex mercatoria* or special category of "law merchant" applicable to those transactions. He rejects the category on the ground that, if it exists, its binding force would have to derive either from public international law or the municipal law of whatever national regulatory body is seized of the case. He cites the dicta of the Permanent Court of International Justice in the *Serbian Loans* case in support of his position, but does not delve more deeply into the sources or implications of the notion of an independent *lex mercatoria*.

The second part of the course focuses solely on "private persons," within which category he includes both physical persons and collective persons, corporations, as individuals before the law. He distinguishes four situations: (1) presentation by a state of a claim on its own behalf to protect its national (including corporations); (2) creation by the states involved of a settlement procedure, typically arbitration, by which the injured "person" is authorized to present his own claim either in his own name or as the legal creation of the complaining state; (3) creation by the states involved of a settlement commission or court to which injured individuals are given direct access, typically in the European and Latin American human rights institutions; and (4) general arrangements of international organizations such as the United Nations Human Rights Committee, which can receive private persons' petitions and give them some political weight, but is not empowered to settle any claims or resolve any legal issues. A completely different approach is also mentioned under which states have occasionally, by treaty, obligated themselves to accord specified rights to foreigners in their own municipal laws.

But, departing from this mere categorization, the most interesting settlement technique seems to be what Barberis calls "*les accords quasi internationaux*." By that he means arrangements directly between a state and a foreign person by which a tribunal is designated and given jurisdiction over contractual disputes. Typically, the two parties, the state and the foreign enterprise, are considered equal before the law and a choice-of-law clause directs the tribunal to the body of substantive law it should find and apply. This leads to a discussion far too complex to summarize here, setting into perspective such arbitral awards as *Lena Goldfields* and *Abu Dhabi*, the three Libyan oil expropriation cases and other well-known arbitrations. The approach is positivist, severely criticizing, for example, the assertion by arbitrator Mahmassani in *LIAMCO* of a rule of *jus cogens* forbidding contractual limits on a state's power to nationalize a foreign enterprise (p. 199). But it is not clear that Barberis has kept in mind the distinction between the legal power of a state to change property rights within its territory and a con-

tractual obligation by the state not to do so, which might not diminish its power, but could change the legal result of exercising it.

Turning to physical persons, Barberis takes the usual positivist view that even "war crimes" are essentially a matter of the obligations of states to prevent or punish atrocities by their agents. He also believes that the notion that international law applies directly to individuals is overstated, even though it was applied in some cases by Allied tribunals immediately after World War II and is embedded in some international documents, like the 1977 Protocols to the 1949 Geneva Conventions.

Chapter 2 puts the international capacities of international organizations in the same positivist perspective. Barberis regards every actor in the international arena, whether a state, transnational religious organization, belligerent, liberation movement or functional organization, as a legal order or regime independent of every other, and the international legal order as that which regulates the interaction among these separate orders (pp. 224-25). The result is a dualist model of great complexity, but easier to relate to reality than the monist models posed by others. In their external relations, international organizations that are accepted as partners to treaties or correspondence by other subjects of the international legal order are governed by the rules of that order in those relations. But he is silent regarding the most difficult issues, e.g., whether a state that does not choose to correspond with an organization of which it is not a member must accept organizational registry as shielding the individual members of the organization from direct correspondence and international responsibility for the liabilities that a state of registry would normally have for its ships or aircraft. In that case, Barberis notes merely that some organizations may have ships and aircraft flying the organizations' flags (p. 232). Finally, in this section, he addresses public international enterprises, by which he means jointly administered facilities like Cointrin airport in Geneva (France-Switzerland) and the Terneuzen Canal (Netherlands-Belgium). He finds these facilities to be governed solely by the pertinent document(s) and the laws chosen by the states that created them.

The last chapter deals with national liberation movements. It begins by asserting that in 1817 the international legal order first applied the term "belligerent" to an organized fighting unit that was not the military arm of a state engaged in a war; the assertion is not footnoted and, given the ancient origins of the concept of the laws of war applying to nonstate actors, seems either a technical quibble or wrong.³ Similarly, the assertion that Article 3 of the 1949 Geneva Conventions gives nongovernmental parties to an armed

³ For example, the "pirates" defeated by Pompey the Great in 67 B.C. were considered by the Roman Senate to be subordinate to Rome and not independent, but were in fact treated as honorable enemies during and after the conflict. 5 PLUTARCH, *PARALLEL LIVES OF GREEKS AND ROMANS* 173-77 (C. B. Perrin, trans. 1917). While the privateers of James II and Louis XIV were treated as "pirates" under English law after the abdication of 1688, their defeated soldiers after the battle of the Boyne were treated as combatants and not as criminals. See the petition of John Golding and others to the House of Lords in 1693, 12 HOWELL'S STATE TRIALS 1270, 1275 ff. (1816).

conflict the status of subjects of international law (p. 241) seems difficult to reconcile with the terms of that article expressly denying that its provisions affect the legal status of the parties to the conflict. However, the discussion that follows, in which the author lists many UN General Assembly declarations purporting to give international legal status to named "national liberation" movements, is placed in much better perspective by reference to the basic requirement of *opinio juris*, as distinct from political passion and repetition, for the formation of a rule of customary law. Barberis finds that the resolutions play a role in the legal regime of the United Nations and have contributed politically to the evolution of legal rules in a broader context, particularly in the drafting by the International Committee of the Red Cross of the provision of Protocol I of 1977 to the 1949 Geneva Conventions that purports to apply the general law of war to armed conflicts in which peoples are fighting against colonial domination.

Attempting to find objective characteristics that distinguish "national liberation movements" from other subjects of the classical international law of war, Barberis ultimately finds two: (1) their status is constituted by recognition; and (2) they need not control any territory. Whether this categorization will serve a useful purpose in the international legal order, or is merely political or moral, seems to be a matter about which readers may disagree.

The practical importance of distinguishing political and moral considerations from legal considerations is a major underlying theme of the course by Derek Bowett (Cambridge University), *Contemporary Developments in Legal Techniques in the Settlement of Disputes*. It begins by pointing out why states are often reluctant to permit third parties to settle their disputes at all, and why the application of substantive rules of law is frequently believed to be inappropriate. Because the "legal process" itself frequently relies on compromise, "[t]he search for certainty is misguided, and predictability of result is a myth" (p. 191), states with real interests to protect must be reluctant to give discretion to any third party. Bowett overlooks the situation in which a government, expecting to lose, will nonetheless agree to third-party settlement in order to be able to blame the loss on factors beyond its control, thus disarming a vocal constituency that has made a domestic political issue of its supposed "legal" rights to the embarrassment of the government. But that minor exception does not take away from the major point. The rest of the course is a general *tour d'horizon* of the problems of judicial settlement, from the tendency of the legal approach to attach complete blame or complete vindication to complex patterns of facts in which neither side is entirely right or wrong by any objective measure, through the increasing practice of nonappearance (the article was written before the United States withdrew from the *Nicaragua* case⁴), to enforcement. It does not go deeply into any particular matter and seems to over-generalize some very controversial conclusions, for example: "in most juris-

⁴ Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

dictions, a Sovereign State's agreement to arbitrate is deemed to be a waiver of immunity . . . [and] is generally regarded as extending to enforcement and execution of any award" (p. 220).

Another *tour d'horizon* was given in a very different subject matter by Stephen Gorove (University of Mississippi), who lectured on *International Space Law in Perspective—Some Major Issues, Trends and Alternatives*. He finds that the Bogotá Declaration, by which equatorial states claimed sovereignty up to the 35,800 kilometer-high location of stationary orbits, has not affected the activities of the space states; that the easy "spacial" demarcation of 100–110 kilometers, plus the path of vehicles mounting into or returning from space, has been accepted by many states; and that the "functional" approach that fixes no boundary but determines the legal regime by the activity involved, has been accepted by many others, though no consensus has been reached. Reviewing the Moon Treaty and other documents, and measuring them against realities, he concludes that national sovereignty can be exercised in vehicles in free space by a state of registry and that the apparent prohibition on exercising sovereignty on celestial bodies will raise a host of legal and practical problems if and when human settlements are established. Those who believe that a state could not legitimately exercise national authority will have to suggest some other way of dealing with the obvious problems of governing a human community. Turning to resource exploitation, Gorove finds enough substance in the "common heritage of mankind" phrase as adopted in the Moon Treaty to raise legal questions certainly regarding exhaustible resources, and possibly regarding even inexhaustible solar radiation, whose utilization by mankind on earth now seems on the verge of feasibility. Similarly, interpreting the words of the treaties applicable to military uses of space raises another host of unanswerable questions, where the language chosen by the treaty framers sidestepped the difficult problems rather than resolving them. With regard to registration and liability, the international agreements also refer many questions back to national authorities, and the complex choice-of-law problems implicit in their terms, as well as the complex legal regimes of states, such as the United States with its federal system, leave much discretion to administrators and little certainty in the law.⁵ Finally, Gorove addresses satellite communication. In what may have been premature optimism, he suggests that if INTELSAT can expand its domestic services, the needs of the less-developed countries might be accommodated without a radical change in the current organization of space activities. In sum, this is a masterful course, hitting the high spots in comprehensible detail without much oversimplification.

Le Contrôle par les organisations internationales de l'exécution des obligations des Etats was the title of the course given by Jean Charpentier (University of Nancy). The word "contrôle" is a term of art in French, meaning rather

⁵ Some indication of the causes for this situation in the negotiating process are analyzed in Rubin, *Liability for Damages from Space Activities and the Need for Domestic Legislation*, 7 AFJAG L. REV. 30 (1965). I do not like to cite my own rather outdated work in a book review, but Gorove cites very little in this section and his bibliography is slim.

more than verification and less than supervision. Doctrinally, three types of *contrôle* exist: (1) unilateral *contrôle*, by which the organs of the state itself enforce international obligations, as when the courts apply international law to municipal relations (what Scelle, in a famous phrase, called “*dédoublement fonctionnelle*”); (2) reciprocal *contrôle*, by which the parties to a treaty react to breaches, and states whose interests are threatened by the actions of another ultimately assert rights of self-defense, in some cases through agreement of the treaty members, like the Antarctic Treaty’s provisions for any party to send observers to the bases of any other in the Antarctic; and (3) institutionalized *contrôle*, by which third parties, typically international organizations, are given the authority to oversee the obligations of members. An example would be the institution of a third-party “protecting power” under the 1949 Geneva Conventions relative to the protection of the victims of armed conflict or the publication by the International Labour Organisation of national data in its annual reports on matters of concern to the Organisation’s Council. There follows a categorization of the sorts of matters states submit to the *contrôle* of international organizations, and a discussion of the legal basis for that submission (ultimately, consent of the state) and the relinquishment of authority by the *contrôle* organization. Techniques of *contrôle* are analyzed, principally, but not necessarily and not exclusively, involving the receiving of information from official and, if agreed, unofficial sources; inspections, if permitted; and various degrees of external communication, from private correspondence with the agents of the state being “*contrôled*,” through in-house reportage, to general publication. Finally, the effective limits of *contrôle* are set out and it is made clear that “enforcement” by international organizations is not involved in the concept. In a final overview, Charpentier concludes that *contrôle* serves four important functions: (1) it encourages the observance of the rules of international law; (2) it identifies areas in which the transition from “soft law” to positive law is proceeding and areas in which international organizations can encourage that movement by exercising their particular powers; (3) it institutionalizes the areas of developing international cooperation, making closer cooperation easier in areas of mutual concern; and (4) it provides states with a view of things detached from purely national interest, thus encouraging the development of public institutions capable of common use. In sum, this is a fine analysis of a potentially important subject that has been rather neglected in the English-language literature.

A subject less theoretical, but equally important, is *The Protection of Minorities before the United Nations*, which was the title of the course by Felix Ermacora (University of Vienna). But because the principal document of the UN period on which Ermacora relies to translate statements of moral obligation into legal obligation is the 1966 Covenant on Civil and Political Rights (Article 27 of which forbids parties to deny persons belonging to minorities “the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”) and the Covenant is binding as a treaty on its parties, the course goes far beyond the special world of the United Nations.

Indeed, Ermacora extends it to include the special status of "indigenous peoples" agreed on by the parties to ILO Convention No. 107.

He begins by noting the special protection given by treaty to "minorities" in the minorities treaties and various other documents directly related to the political reorganization of Europe at the end of the First World War, pointing out that they have specific objects and are not related to "human rights" as the term is understood today. He proceeds to the difficulties of defining a "minority," adopting the definition proposed by the special rapporteur for the United Nations Commission on Human Rights, Francesco Capotorti:

Minority means a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

As to the content of the "rights" minorities now possess in general international law, Ermacora generalizes from various treaties relating to group rights. He asserts that the basic rights have become part of the *jus cogens*, although he presents no clear argument for that view other than citing the dicta of the International Court of Justice in the *Barcelona Traction* case affirming generally that there exist obligations *erga omnes* in the international legal order. His language is careful, but might be misleading. For example, he concludes at one point (p. 327) that "national and racial, perhaps also religious, minorities could be considered peoples in the sense of an autonomous concept of the United Nations instruments. For them self-determination is inalienable." Yes, but not because they are "minorities" but because they are "peoples" within the sense of documents other than those being examined.

His conclusions seem well supported when they relate to moral values and disputable when translating those moral values into assertions of "law." He confirms the authority of the United Nations to consider the plight of minorities as defined by Capotorti, denies that there is a single body of international law containing provisions on their protection, but asserts that "there is direct and indirect protection on the international level," finding seven particular obligations for states toward their minorities, including the prohibition of genocide, restrictions on compulsory assimilation and prohibitions on discrimination on the basis of minority "characteristics." He declares these rules to be part of the *jus cogens* but then denies that minorities as such are subjects of international law. He does not grapple directly with the question of *jus standi* but asserts—undoubtedly correctly, but, again, possibly overbroadly—that there are organizations, both states and NGOs, through which minorities can claim "rights." In sum, this is a scholarly study of an area of public international law in transition, whose author sees perhaps a stronger direction of movement and greater specificity than seems supported by the direct evidence.

A special series of lectures was given in commemoration of the fourth centenary of the birth of Hugo Grotius. The first, *Le Droit international dans*

la conception de Grotius, is a very learned review by Judge Roberto Ago (International Court of Justice) of the jurisprudential mind-set evident in *De jure belli ac pacis*, which concludes that the distinctions between natural and positive law theorists today can be traced, in a sense, to Grotius's use of both a priori and a posteriori forms of reasoning, and the logical power of both. It is at least comparable to, and much more compact than, Lauterpacht's seminal work, *The Grotian Tradition in International Law*.⁶

The lecture by Hartmut Schioldermair (University of Cologne), *The Influence of Grotius' Thought on the Ius Naturale School*, is also learned, but seems so steeped in the natural law tradition itself that its interpretations are of narrower interest. For example, Schioldermair concludes, in what seem absolute terms, that it is the similarity of the 20th century's ideological antagonisms with those of the 17th century that has revitalized the memory of Grotius's thought. There is no mention of less "objective" factors, such as the search, by those holding to a certain ideal of international organization, for a source of legal authority and substantive rules that would release them from the legal constraints of their charters, and let them legislate for the world without regard for the constituency groups that inhibit the discretion of democratically elected national officials.

Willem Riphagen ("Erasmus" University, Rotterdam) lectured on *Grotius and the New Law of the Sea*. This also seems to reflect a rather unbalanced perspective. Riphagen seems unaware that the great shift in Grotius's views about *mare liberum* came not merely in his advocacy of 1613-1615, but was reflected in mature thought by at least 1632, when he wrote that the sea is subject to appropriation (*imperium*), just as the land is, by human presence or physical domination by neighboring land.⁷

Judge Antonio Truyol Serra (Constitutional Court, Madrid) spoke about *Grotius dans ses rapports avec les classiques espagnols du droit des gens*. This learned lecture, too, is marred to some degree by what seems a misunderstanding of Suárez's positivism and a surprising silence with regard to Vitoria's principal antagonist in the great debate at Valladolid in 1550-1551: Juan Ginés de Sepúlveda, probably the leading spokesman for the cultural imperialist notion of the *mission civilisatrice*, against which Grotius, like Vitoria, posed a system based on legal equality.

The final lecture, by Robert Feenstra (University of Leiden), is titled *Grotius et le droit privé européen*. It is probably of more interest to historians of private international law than to readers of this *Journal*.

One other course, although not primarily in the public international law field, deserves special mention: *Contrats entre Etats ou entreprises étatiques et personnes privées; développements récents*, by Jean-Flavien Lalive (Geneva). After categorizing a number of legal models to explain the bindingness of contracts between multinational enterprises and foreign states, and examining in some detail the opinions of the arbitrators in a number of important

⁶ 23 BRIT. Y.B. INT'L L. 1 (1946).

⁷ *De jure belli ac pacis*, bk. II, ch. III, sec. xiii, para. 2. I have checked the 1632 edition but have been unable to find either the 1631 or 1625 first edition.

cases, particularly the three Libyan arbitrations and *Kuwait v. Aminoil* (1982), he criticizes the political approach urged by S. B. Asante and the separation of contractual from sovereign rights urged by Sir Gerald Fitzmaurice, to argue in favor of a *lex mercatoria* model of transnational contract law existing independently of other legal orders. This course can be read side by side with the second part of Barberis's course, to see how two very eminent authorities, viewing identical data, can construct equally persuasive and totally incompatible models. Those responsible for selecting arbitrators to determine disputes, particularly contractual and expropriation disputes, between multinational enterprises and foreign governments, would do well to ponder the differences in argument the two approaches imply, and the possibility that there is no legal certainty in this area.

In another course that straddles the distinctions between private and public international law, *The Extraterritorial Effects of Antitrust Laws*, J.-G. Castel (Osgood Hall, Toronto) reviews the self-imposed jurisdictional limits of the United States, Canada and the European Community, and the "claw-back" statutes of the United Kingdom, Canada, Australia and France, to propose choice-of-law rules as a means to rationalize the conflict of national laws relating to restrictive business practices. His proposal is largely an expansion of the approach already signaled in private enforcement actions and in the *Restatement (Third)* in the United States and he approves the list proposed by Professor Andreas Lowenfeld in the 1979 Hague lectures of 10 factors to be weighed in making the choice-of-law decision. He concludes by suggesting that uniform rules be worked out by the Hague Conference on Private International Law.

Primarily descriptive, but of undoubted interest to many readers of this *Journal*, is the course by A. O. Adede (United Nations), *Legal Trends in International Lending and Investment in the Developing Countries*. Other courses at the Hague Academy in 1983 were by Olivier Long (GATT), *La Place du droit et ses limites dans le système commercial multilatéral du GATT*; Octavian Capatina (University of Bucharest), *L'Entraide Judiciaire internationale en matière civile et commerciale*; Roger Jambu-Merlin (University of Law, Economy and Social Sciences of Paris), *La Loi Applicable aux accidents du travail en droit international et en droit communautaire*; Didier Operti Badan (University of Montevideo), *L'Adoption Internationale*; and F. Gamillscheg (University of Goettingen), *Rules of Public Order in Private International Labor Law*.

In sum, 1983 was an extraordinary year for the Hague Academy. The courses as a whole were of unusual depth and interest.

ALFRED P. RUBIN

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Textos de Derecho internacional público. By Cesáreo Gutiérrez Espada and Alfonso-Luis Calvo Caravaca. Madrid: Editorial Tecnos, 1986. Pp. 921.

Textos de Derecho internacional público, a recent Spanish sourcebook of documents on public international law, reflects a welcome approach to

teaching public international law. In addition to presenting a diverse, up-to-date set of basic public international law texts, the book highlights the Spanish perspective on international law by the judicious inclusion of materials illuminating Spain's current practice in the field. The editors are clearly intent on emphasizing to users of the book that international law is a part of Spanish law, an outlook that seems to reflect the increasing self-confidence of Spain vis-à-vis its position in the international sphere.

With the exception of the law of armed conflicts and international institutions, the book covers most of the basic topics in public international law, including sources of international law, the relation between domestic and international law, state responsibility, self-determination as an element in the formation of new states, recognition and succession of states, international protection of the individual, jurisdiction and sovereignty over territory, sea and airspace, the peaceful settlement of disputes, the use of force, disarmament, and economic cooperation and development. For each of these topics, full texts and excerpts from international court decisions, conventions and UN resolutions are given. More recent texts include the 1986 Vienna Convention on Treaties between States and International Organizations and the decision of the International Court of Justice in *Nicaragua v. United States*. Each multilateral agreement includes a useful footnote listing the parties to it.

The Spanish perspective is developed by the inclusion of certain treaties that Spain has concluded and internal legislation pursuant to international norms. Refugee law, for example, is covered not only by the UN Refugee Convention and its Protocol, but also by the 1959 European agreement on visas, the relevant provision of the Spanish Constitution and the Spanish domestic laws and decrees regulating the rights to asylum and refuge. A similar approach is taken to the law of the sea, where Spain's bilateral treaties with France and Italy concerning continental shelf delimitation and fisheries, as well as relevant Spanish domestic laws and regulations, follow the law of the sea conventions (1958, 1982). Spain's membership in the EEC is acknowledged by the inclusion of European materials, particularly in the area of human rights and extradition. Also noteworthy, with respect to the distinctly Spanish perspective of the book, is the inclusion of the Agreement on Friendship, Defense and Cooperation between the United States and Spain in the section on territorial sovereignty.

This book stands as one of the very few well-conceived and up-to-date sourcebooks on public international law available in Spanish. It should be of great interest to scholars and students in Spain, and useful generally throughout the Spanish-speaking world.

LAURA BOCALANDRO
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Sir William Scott, Lord Stowell: Judge of the High Court of Admiralty, 1798-1828.
By Henry J. Bourguignon. Cambridge: Cambridge University Press,
1987. Pp. xiv, 310. Index. \$49.50, cloth.

Much of the municipal law of nations begins with Sir William Scott. His decisions were introduced into the American practice of international law by such authorities as Chancellor Kent,¹ Henry Wheaton,² Justice Joseph Story³ and Chief Justice John Marshall.⁴ To review the early history of the practical application of the law of nations in common law jurisdictions is, in essence, to chart the career and jurisprudence of William Scott, later Lord Stowell. Henry Bourguignon has offered, with a few self-imposed limitations, an outstanding judicial biography of this most interesting judge.

Bourguignon's book concentrates on Scott's decisions in prize and civil admiralty ("instance") cases. Excluded from consideration are those opinions that he rendered on such subjects as crimes encompassed within the admiralty's jurisdiction, slave cases⁵ and those treating the finer points of civil practice and procedure. The author has decided to defer discussion of these matters for later publication (p. xi). Moreover, any details of Scott's contributions to other areas of civilian practice, including ecclesiastical law, are limited to those pertinent to the biographical sketch contained in the second chapter of the book.

The author devotes his first section to a discussion of the historical development of the Admiralty Court's jurisdiction. This was a wise vehicle for exposition. Without it, the modern reader, used to the integration of admiralty jurisdiction with that of equity and law, would have been befuddled by the bitter competition in post-Tudor England between the common lawyers practicing in the courts of law and the civilians working in the admiralty and church tribunals. Indeed, the fact that these rival practices of law were reconciled at all in Britain by the 19th century can be attributed to Scott's judicial restraint. Bourguignon rejects the theory, advanced by some,⁶ that Scott had an abnormal fear that a common law court would issue a writ of prohibition, thus withdrawing jurisdiction over a matter from the admiralty. Instead, he correctly places this restraint in the context of over 200 years of jurisdictional conflict and Scott's inherent conservatism (p. 251).

Scott's most significant contribution to the law of instance and prize was that he ensured that most of his decisions were published. Before his time, precedent was established by an oral tradition, through the exchange of notes of arguments and proceedings by the close-knit group of civil lawyers. One can appreciate the real effort that was involved in "finding" the law in

¹ See 1 J. KENT, COMMENTARIES ON AMERICAN LAW 69-70 (1832).

² See H. WHEATON, A DIGEST OF THE LAW OF MARITIME CAPTURES AND PRIZES (1815); H. WHEATON, ELEMENTS OF INTERNATIONAL LAW (G. Wilson 8th ed. 1936).

³ Story and Scott carried on a vigorous correspondence throughout their later lives. See 1 W. W. STORY, LIFE AND LETTERS OF JOSEPH STORY 307 (1851). See also R. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY—STATESMAN OF THE OLD REPUBLIC (1985).

⁴ See *The Venus*, 12 U.S. (8 Cranch) 253, 299 (1814); B. ZIEGLER, THE INTERNATIONAL LAW OF JOHN MARSHALL (1939).

⁵ As a consequence, such famous cases as the *Le Louis*, 2 Dod. 210 (Adm. 1817), dealing with the right of visit on the high seas for vessels suspected of engaging in the slave trade, are not discussed.

⁶ See F. WISWALL, THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800, at 33 (1970).

Scott's time. But it was there. Bourguignon's fine and painstaking research shows us how often precedent was actually used, and it conclusively refutes the suggestion that Scott fashioned modern admiralty law out of whole cloth. This is a major premise of the book and the author more than adequately proves it.

As for the substantive law that Scott practiced and then judged, Bourguignon's emphasis is rightly placed on prize. One chapter is, however, dedicated to explaining Scott's forays into such areas as suits for mariners' wages, for possession and salvage, for bottomry bonds (an early form of ship mortgage) and for damages arising from collisions and personal injury. It is apparent from this discussion that Scott had a keen insight into the very risky business of shipping, a discernment revealed in his adoption of the trade's motto, "[S]hips were made to plough the ocean, and not to rot by the wall" (p. 86).⁷

Scott was truly of the old mercantilist school, an economic system and political mentality that was being challenged during the Napoleonic period, and would later be utterly supplanted by the forces of the Industrial Revolution. It nevertheless provided the most cogent theory guiding Britain's prosecution of the war against France, a war nearly global in proportion and almost total in its commitment, and consumption, of national resources. Prize law was nothing more than the judicial determination of the propriety of captures at sea of the enemy's ships and cargoes. But although dressed in the garb of an unbiased proceeding governed by the law of nations, the prize cases that Scott presided over for 30 years unquestionably implicated such high state policies as treatment of neutral powers, the ways and means of preserving and expanding the colonial trade, and the most essential matter of winning the war against Napoleon.

Bourguignon divides his analysis of Scott's prize jurisprudence into a long chapter on the law of nationality, the determination of enemy character essential in any capture, and another section dealing with such doctrines as neutral rights and duties, contraband, blockade and colonial trade. The treatment of these subjects is quite good, if a bit mechanical with its consideration, in turn, of 18th-century precedent and Scott's contributions as an advocate and jurist.

Unfortunately, this doctrinal discussion is not illustrated with any assessment of Scott's impact on later courts and publicists, particularly in American practice. Prize law is portrayed as a historical relic. In one sense, of course, it is. The last prizes adjudicated in this country's courts were in 1948.⁸ Owing to the nature of modern naval warfare, one can legitimately wonder if any lawyer will have recourse to cite Scott's prize decisions. In another sense, however, certain doctrines espoused by Scott, particularly in the law of nationality and domicile, continue to influence (some might say haunt) us today.⁹

⁷ The *Apollo*, 1 Hag. 306, 312 (Adm. 1824).

⁸ See *United States v. The EUROPA*, 80 F.Supp. 12 (S.D.N.Y. 1948); *Ling v. 1,689 Tons of Coal*, 78 F.Supp. 57 (W.D. Wash. 1948).

⁹ Scott's opinion in *The Young Jacob and Johanna*, 1 C. Rob. 20 (Adm. 1798), had to be distinguished in that most sublime of decisions, *The Paquete Habana*, 175 U.S. 677, 693-94

Even though we are not privileged with the author's sense of how Scott's legal innovations were later received, he does give us a vision of their contemporaneous relevance. A peculiar glaucoma, however, clouds this vision in several ways. The first, and perhaps of most interest here, is Scott's addition to the understanding of international law. By education and professional affiliation, Scott seemed to be an enthusiastic advocate of the law of nations. But was he really? That he relied on the early publicists of our discipline, such men as Grotius, Vattel and Bynkershoek, is unquestioned. That he was rooted firmly in the natural law theories espoused by these writers and believed that they collectively established the "moral limits of international relations" (p. 141) is undoubted. What can be disputed is whether Scott viewed the law of nations as anything but a static and unchanging entity. An elemental theory of custom seemed to have eluded him. This is especially apparent from Scott's handling of blockade cases, an area of law that, arguably, he created (p. 205). Bourguignon conveys no sense of Scott's having any appreciation of his own role as a maker of international law.

A second problem is in assessing Scott's judicial temperament. This is essential since the author declares that Scott's "fame rests entirely upon his success as an admiralty judge" (p. 50). If success were measured by longevity or number of opinions, Scott would be deemed a great judge. If he were judged by his impartiality and ability to withstand political influence, he would be considered less favorably. Chief Justice Marshall's statement that it was "impossible to consider [Scott's prize decisions] attentively without perceiving that his mind leans strongly in favor of the captors"¹⁰ shows the two sides of the man. It is apparent that Scott toadied for his peership, acted as a lackey for the Portland Government by speaking in Parliament for the controversial Orders-in-Council (p. 219) and generally comported himself in a rather nonjudicial way. He was a reactionary, to boot.

But he also believed in reason, the right reason that enabled nations to coexist under the rule of law. When Marshall spoke of Scott's mind, he meant it in that pure Enlightenment way. And Scott had a very different mind, assuredly, from that of Jeremy Bentham, who made our modern "international law,"¹¹ a neologism that Scott likely loathed. In Marshall's measure of Scott we have reason coupled with prejudice.

All this means, of course, is that Scott was a thoroughly 18th-century Englishman. No better or worse, for that matter, than William Blackstone or Samuel Johnson. Unfortunately, Scott found himself on the bench at a rather uncivilized time. He did his best, as Bourguignon explains, to accommodate his limited conception of the law of nations within a broad horizon of extraordinary lawlessness. Like those today who are expected to uphold the laws of war on the battlefield, Scott had an unenviable job.

(1900) (Gray, J.), which ruled that coastal fishing vessels may not be taken as prize. *See also id.* at 719 (Fuller, C. J., dissenting). Another example of Scott's influence is his decision in *The Indian Chief*, 3 C. Rob. 12, 29, 165 Eng. Rep. 367, 374 (Adm. 1801), which spawned a remarkable debate on the law of extraterritorial domicile.

¹⁰ *The Venus*, 12 U.S. (8 Cranch) 253, 299 (1814).

¹¹ *See Janis, Jeremy Bentham and the Fashioning of "International Law,"* 78 AJIL 405 (1984).

Bourguignon's study should initiate a fruitful reconsideration of Scott's influence on today's international law. Although the book features some repetitiveness and disjointed writing (plainly the product of being written in segments), and also suffers from mediocre indexing and the lack of a table of cases, it will undoubtedly become the modern authority on Sir William Scott's prize jurisprudence. Bourguignon is no apologist. He does what we would expect of any self-respecting biographer: he comes to like his subject.

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United Nations Codification of State Responsibility. Edited by Marina Spinedi and Bruno Simma. New York, London, Rome: Oceana Publications, Inc., 1987. Pp. xi, 418. Index. \$75.

Scholars and international lawyers are just beginning to understand the magnitude of the International Law Commission's work on state responsibility. We are deeply in debt to Marina Spinedi and Bruno Simma for giving us better access to this work through the volume of studies of important themes in the codification by eight young continental scholars. Funded by the Hague Academy of International Law in 1982, these studies present for the first time in one volume an in-depth analysis and appraisal of the most significant portions of the Commission's work to date.

The Commission's unabashed ambition for the progressive development and codification of state responsibility for internationally wrongful acts has astonished observers more for its persistent abstractness than for its apparent utility. As the editors caution, however, this tendency to yawn at the work misses completely the seriousness of the ILC's mission to embrace all of the rules and consequences governing the breach of any international obligation of the state. Apart from the great German and French codifications, one of the most comprehensive projects occurred when Emperor Theodosius II assembled his commission of nine learned publicists in A.D. 429 to collect the imperial edicts from the time of Constantine and codify them and the Novels. His decree stated that "the laws to be observed throughout the world should be arranged in a compendium of sixteen books." Shortly after the 9-year project was done, the Western Empire was undone. With greater hope, the editors see more in the ILC's work than most skeptical Americans have: "No other codification project," they write in the introduction, "goes so deeply into the 'roots', the theoretical and ideological foundations of international law, or has created comparable problems."

By design, the Commission's work does not codify the substantive rules of state responsibility, except in the separate project on strict liability. The main codification, however, builds a concealed structure of baroque complexity and detail, encasing many philosophical and political assumptions yet to be fleshed out. Doubt about the resulting strictures reminds one of Savigny's objections to the codification of German law in the Roman law

tradition, fearing too soon an end to the creative spirit of German custom and a stultifying effect upon the growth of the law as part of the national spirit. While addressing the most important of the structural decisions of the ILC's codification project, the collection remains free from overt ideology except now and then to expose a political or theoretical assumption. Inescapably, we are led to a wonderfully rich, but concealed, dimension about political and economic values in an emerging global society. This discussion might ensue from any of the main topics studied such as the legitimacy of countermeasures and self-defense as responses to delicts, the difference in international responsibility between crimes and delicts, the new role of peremptory norms (seemingly pervasive) on the customary law of state responsibility, whether damages constitute part of the wrongful act, and the different consequences of moral, in contrast to material, damages. The ILC's work deserves this worthy inquiry, whether or not it is a premature gloss on deeper structural stirrings.

The ILC's project on state responsibility began in 1955 with the appointment of Dr. F. V. García-Amador, special rapporteur, to tackle a manageable topic with a narrow focus on injuries to aliens, a subject with much traditional content. After six reports and unease on the part of the Sixth Committee, the ILC broadened the work to its present scope, appointing Professor Roberto Ago as special rapporteur. He submitted eight reports on the comprehensive codification of the origin of responsibility without any substantive primary rules. By 1980, the Commission adopted on first reading his part 1, 35 articles heavily annotated with some of the densest commentary ever published by the Commission. It covered the subjective act of the state (attribution, wrongly considered a subject apt to glaze eyes) and objective breach of the rules of obligation (infuriatingly never defined, but eternally present). With Ago's election to the World Court, Professor Willem Riphagen took over, presenting seven reports that attempted greater clarity in defining regimes of responsibility, and began the work of part 2, on legal consequences of breach, including a possible part 3 on implementation and procedures for settlement of breaches of international obligation. Professor Gaetano Arangio-Ruiz succeeded Riphagen, no doubt aware of the need again to reappraise, possibly to strengthen, the remedies side of state responsibility.

Ten years ago, the ILC decided to treat separately the problem of strict liability for injurious activities not prohibited by international law. It appointed Mr. R. Quentin-Baxter special rapporteur, and from 1980 to 1984, he submitted five reports before his death. Mr. Julio Barboza has continued the work with three reports so far, including six draft articles in his latest report to the Commission in 1987.

Only one study in the book, responsibility for nuclear energy, analyzes in depth the substantive problem of the allocation of the risk of harm from hazardous activities when no wrong is present. Who bears the cost when highly technical industrial activities providing social goods result in transboundary harm to the human environment? This problem confronts difficult questions of both substance and process in allocating the costs of these

activities. The author of this study, Angelo Miatello, concludes that states seem willing to codify the obligation to make compensation for such damage, at least in the abstract, relying on the *Trail Smelter* doctrine. The nuclear accident at Chernobyl illustrates how easy it is for a benign theory of responsibility (for example, separating moral and material damage) to allow a major power to pass on to other countries the social costs of serious and irreversible transborder damage, especially nuclear damage. Toxic pollution from major industrial powers, more insidiously diffuse but no less dangerous to the global environment, transfers the social costs of its harmful effects to later generations and to powerless people everywhere. Miatello's study does not appraise the Chernobyl accident, which occurred after the study was completed. The problems of acid rain and the effect of pollutants on the global climate also present this general question of allocating the cost of transborder harm to the human environment.

Wrongful acts, in contrast to those not prohibited, that involve nuclear energy and cause serious damage to the human environment would fall under the general codification, not as "ordinary" delicts but as "international crimes," according to Miatello. We see here glimpses of how difficult it is to produce a general and comprehensive codification of state responsibility without considering the substance of the rules of obligation. How does the difference between crimes and delicts help clean up the global environment? Though the editors did not include Miatello's study of nuclear energy for any such strategic purpose, I think it shows the inevitable linkages between the special project on strict liability for nonprohibited acts and the general project on responsibility for wrongful acts.

Where, for example, would the Bhopal incident fall? Is the United States responsible for failure to control by regulation the private export of a hazardous technology involving a complex manufacturing process? Is any such failure of duty wrongful? Would the United States have responsibility under the *Trail Smelter* theory for the transboundary risk of hazardous enterprise? What responsibility would India have? Indeed, one might argue that throughout the comprehensive law of state responsibility, the only significant theoretical question ought to be which polity or group of polities and their nationals should bear the social costs of activities attributed to the state under some duty. These costs would include the risks from ultrahazardous activities as well as risks of harm from other activities. The question of international obligation or duty is too metaphysical and moralistic if it fails to address that question. The function of satisfying moral damage or repairing material damage more closely resembles what Roscoe Pound called the general security interest in controlling private self-help and the function of compensation as buying off private feuds to keep the peace. It does not adequately consider the allocation of cost to future generations.

If we pose the problem initially as a question of the allocation of the social costs of certain internationally harmful activities, then we may lessen the propensity to invent a monopoly to authorize collective sanctions against "international crimes" by states, in other contexts called police actions or just wars or community-authorized countermeasures. Manfred Mohr's lucid

study of the distinction between international delicts and international crimes from a socialist point of view strongly supports the position taken in Article 19 of part 1 of the general study and favors keeping it. The study of strict liability is strategic because it shows how the more comprehensive codification simply hides similar allocation-of-risk-of-harm decisions in the language of serious or not so serious moral and material damage. The paper by Attila Tanzi thus examines the ILC's proposal of responsibility without material damage and the forms for reparations, raising the question also addressed in other papers whether responsibility entails the duty to pay compensation or merely a set of secondary legal consequences among which are the possibility of moral satisfaction, the duty to entertain a diplomatic claim and the immediate duty to pay reparations for material damage.

Riccardo Pisillo Mazzeschi examines the important question of state responsibility for the breach of treaty and the relationship to the remedy for breach (suspension and termination) codified in the Vienna Convention on the Law of Treaties. Here is seen the influence of the Roman law that treats both contracts and delicts under the law of obligations in contrast with the contemporary distinction between treaty and customary international law. The consequence is an important one, for if treaty breach also entails international responsibility, then a regime of countermeasures might be available in addition to suspension or termination. The author believes the ILC here completes its otherwise imperfect work in the codification of treaty law.

The other studies develop a better understanding of the ILC's main doctrines than is available elsewhere in one place. The themes build toward a unified structure of responsibility within the fabric of the nation-state system. Much of this edifice rests upon a highly abstract foundation whose assumptions seem grounded in Kantian dualism. Subjective autonomy of will, making up an act of a state, finds expression in part 1, the articles determining the origin of responsibility when conduct is attributed to the state as the primary subject of international law. This identity of individual subjective will with the state as person through the doctrine of attribution constitutes the origin or the beginning point in the legal possibility of a state's responsibility for a wrongful act. The wrongfulness of the act occurs when the subjective act breaches an objective primary norm of obligation. At that moment when the subjective act encounters the objective regime resulting in breach of obligation, an internationally wrongful act springs into "existence" with new legal consequences. The secondary norms governing satisfaction, reparations or countermeasures create new obligations occasioned by breach.

Within this framework, the various studies analyze and appraise the doctrine. Two of the best papers are revisions of earlier published studies on countermeasures and self-defense in state responsibility. Denis Alland's work, especially, develops the linkages of the codification to political and legal theory, but with too little critical appraisal of the Kantian (Kelsen) and Hegelian (Jhering) assumptions identified. That paper stands out as one of the least technical and most valuable of the studies. Peter Malanczuk's study relates the doctrinal meaning of countermeasures and self-defense in the

codification project to traditional concepts of sanctions (such as self-help, reprisal and retortion) and to UN law on the use of force. These areas need greater attention in light of the World Court decision in *Nicaragua v. United States* (decided after the study was written), now in its reparations phase, further developing the law of countermeasures and self-defense as part of state responsibility.

The problem of intertemporal law, taken up by Wolfram Karl, both in the moment and duration of the delict and in the question of time of damage and its extension into the future, suggests relativity between generations and between cultures and ideologies. Interestingly, *jus cogens superveniens* is introduced into his discussion with some skepticism over its intertemporal use such as in wars of national liberation and self-determination. "Only a fundamental change in the most basic convictions of international society should exempt a State from its responsibility for previous acts." Freeing slaves of a ship in harbor several hundred years ago formed an international wrong. Today, freeing slaves (freeing coerced labor?) would be not only lawful but also mandatory under principles of *jus cogens*.

Hazem Atlam's study criticizes the neutral principles argument of the equivalence of attribution of responsibility for conduct of insurrectional movements and for national liberation movements to later governments or states. Attribution of wrongful acts by a defeated government is not the same in each case. For successful insurrections, responsibility is attributed for acts of the defeated government. For successful liberation movements, Atlam argues that the succeeding government might not be responsible for the acts of the defeated government. Again, the ideological grounding of this criticism of the ILC draft articles reveals a consciousness that needs critical appraisal in scholarship.

Especially useful to scholars in reaching the deeper policy considerations are appendixes containing all draft articles to 1985 and synoptical tables of reference to all ILC and General Assembly proceedings on the various drafts and commentaries. A bibliography of 178 titles covers extant scholarly studies (mostly European) of the codification project by the ILC. A systematic classification of these studies provides an immediate aid to research, one of the most convenient references in the volume. A good index integrates subjects across the various studies.

This collection of papers by European scholars ought to spur American and other scholarship on this important codification. The editors in particular should be congratulated for presenting studies of the codification themes that no longer can find repose in the bureaucrat's drawer.

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La Codification de la succession d'Etats aux traités: Décolonisation, sécession, unification. By Zidane Mériboute. Paris: Presses Universitaires de France, 1984. Pp. 272. F.135.

This is a well-conceived and detailed study of the history of the codification of the law of state succession as it relates to treaties, and will be useful to the French-reading scholar of the law of state succession as that law has now been embodied in and expressed by the Vienna Convention of 1978. It reviews the state practice on the question and contains a detailed review of the codification efforts of the International Law Commission and the discussions that took place in the Sixth Committee in the early part of the 1970s, which culminated in the 1978 Convention.¹ The book contains a solid exposition of the different and conflicting values and perceptions underlying the development of this important multilateral treaty and reflecting the contrasting schools of thought between north and south, east and west, during the period in question; it contains a lucid and carefully researched exposition of the debates and varying positions on the several important points in the Convention.

The book is essentially divided into three parts. First, a general introduction sets forth in summary form the principal theories of state succession in the matter of treaties espoused over the years and also the conflicting opinions as voiced in the International Law Commission. As is well known, the significant element that haunted each aspect of the Commission's work and the later travails of the delegations in the drafting of the actual Convention was the question how far a state should be bound by the undertakings of its predecessor: the so-called question of the *tabula rasa* or "*le principe de la table rase*." This problem acquired peculiar importance and sensitivity following the massive decolonizations of the early 1960s, and, indeed, was the *fons et origo* of the codification effort itself. The dead hand of the former imperial and colonial powers was seen to persist in the tangled web of international agreements inherited by the newly independent states from their colonial masters, with the result that the debate over the law of state succession became imbued with complex ideological colorations in the two postcolonial decades of the 1960s and 1970s. This reviewer recalls, from personal experience, how even an advanced newly independent state such as Ghana was baffled and beset, in the early 1960s, by complex decisions about which treaty arrangements it wished to inherit and which it wished to disavow.

The introduction is followed by a detailed analysis of the law of state succession (in the matter of treaties) relating to the creation of a new state, normally by decolonization or a similar grant of independence, but also in instances of (subsequent) secession such as the cases of Pakistan (1947), Singapore (1965) and Bangladesh (1971). The fact that the vast majority of decolonizing situations occurred well before 1978 underscores the obvious recognition that history had already run its course as far as most newly independent states were concerned by the time the Convention was in fact signed.²

¹ Vienna Convention on Succession of States in Respect of Treaties, UN Doc. A/CONF.80/31 and Corr.1 (1978).

² "[O]n peut ajouter le fait que la partie de la Convention concernant les Etats nouvellement indépendants est inutile à l'heure actuelle, puisque la plupart des pays sont décolonisés" (p. 218).

This lends specific interest to the third part of Mériboute's study, which deals with the complex situations attending instances of annexation, union and dissolution of states. A businesslike conclusion follows. There is also a detailed and useful bibliography, and two annexes (the 1978 Convention and the 1974 draft articles proposed by the International Law Commission, given in their French form). The only glaring flaw is that there is no trace of an index;³ this may perhaps be occasioned by the typically detailed continental table of contents, but it is, nonetheless, inexplicable in a work of this class, published by the Graduate Institute of International Studies in Geneva and the Presses Universitaires de France.

This book therefore occupies an interesting and important niche in the scholarship on the law of state succession. It is particularly important for at least two reasons. First, it contains a thorough study of the opposition of various points of view, in the ILC and the convention debates; objective and useful summaries of the negotiating positions of the various representatives and delegations; and useful references to the speakers and their specific interventions on the several issues at various times.⁴ Mériboute also distinguishes between the kinds of rules applicable to different types of international obligations: institutional, lawmaking, normative, synallagmatic, bilateral and so forth.

Second, it is a work by a distinguished scholar from the Third World—in particular, from Algeria, a country whose travails for independence from its metropolitan power were long, bitter and hard fought. It therefore offers an interesting perspective, touching on a number of aspects of the views of states that were former colonial territories on the question of the degree to which they should be bound by decisions of their former colonial masters; it creates a natural interest and sympathy in the reader for the plight of the new countries. It is able to do this, moreover, because Mériboute is remarkably objective and free from evident bias of any kind. It is commendable for a scholar from the Third World to be able to deal with such a complex subject that has aroused so many sensitive reactions, in a manner that is completely free of "Third World rhetoric" and argumentative distortion of any sort.⁵ It is reassuring to see how professional balance can overcome what must otherwise have been a strong predisposition toward a given point of view; it is instructive to observe that the author's message gets across far more effectively and thoughtfully when presented objectively and dispassionately.

³ Continental scholars would do well to remember that a detailed work of scholarship is only as good as its index, and that the lack of one will necessitate more work on the part of the reader than is saved on the part of the author and his editor.

⁴ Indeed, one cavil with the author's style is that *too much* is given to footnotes. This reviewer is pluperfectly allergic to end notes, and is therefore grateful for the author's use of notes at the foot of each page, but, nevertheless, in many instances, one can spot interesting matter submerged in the footnotes, as well as the secondary reference, that could probably have been embodied in the text.

⁵ This contrasts quite sharply with another recent book on state succession by an Ethiopian scholar on a particular aspect of state succession and the "East African solutions": Yilma Makonnen's book on *International Law and the New States of Africa* (1983): which see at 364, 373-74, 406 and review (by this reviewer) at 80 AJIL 242, 245 and 245 n.8 (1986).

sionately than when clouded with rhetoric and bias. The injunction is again confirmed that it is usually best to let matters speak for themselves.

This is also one of the first overall surveys of the build-up to the work of the International Law Commission and the fate of its draft articles as they were amended through the Vienna conferences leading up to the 1978 Convention. It is certainly a useful book for the scholar of this area of the law, as well as for the student of the work of the ILC and the international treaty-making process since the Second World War. It is a relatively specialized overview, however, since the subject of which it provides such a useful survey is itself specialized. It is perhaps too detailed for the general reader, although the scope and accuracy of the scholarship appear to be excellent.⁶ It contains brief summaries of the state practice in the field in the context of various aspects of state independence, and short résumés of the historical theory and practice relating to this subject. This is not enough solid food for the in-depth scholar of state succession outside the codification history of the 1970s, but the book contains sufficiently appetizing material, coupled with expansive references to secondary works and other sources, to serve as a useful guide in the area.

Mériboute's contribution is an excellent addition to the practitioner's bookshelf if he or she is concerned with the specifics of what has happened to the law of treaty succession since the 1960s, and specifically with the results and salient details of the codification effort of 1978. In summary, it is valuable not only as a compendium of what happened, but also as a source-book for further research into the primary sources of the debates and positions that led up to the codification achievement of 1978.

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Vergleich und Klagerücknahme im internationalen Prozeß. By Gerhard Wegen.
Berlin: Duncker & Humblot, 1987. Pp. 484. DM 188.

This doctoral thesis from Tübingen is the first monograph on a topic of great practical importance—the various forms of settlement and discontinuance of international proceedings. The author analyzes with great subtlety the relevant rules of 40 treaties and draft projects that aim at establishing an international dispute settlement machinery for interstate litigation as well as for disputes involving private parties. In a first, general part, the author explains the basic characteristics that distinguish international proceedings from those before national tribunals. He avoids the mistake of most of the

⁶ It is, however, regrettable that the publisher was not able to have the book properly proofread. Although its format is very polished, it contains a large number of typographical errors that distract even an English-speaking reader and that could have been easily avoided without too much more effort: the spelling, for example, of Professor D. P. O'Connell's name is given in at least two variants, an error that, in the matter of state succession scholarship, is inexcusable. This, like the lack of an index, is sheer inefficiency; one wishes that such an excellent study will, in a future edition, receive more careful polishing.

relatively few authors who, before him, have dealt with aspects of the problems discussed in his book. These authors approached their subject from the viewpoint of their domestic procedural law and used the latter as a basis for their comparison. Wegen realizes that the basis of international proceedings is radically different from that governing proceedings under domestic law. Whether the international adjudicating entity is permanent like the International Court of Justice or established ad hoc or semipermanent, i.e., established by individual acts in accordance with permanent rules, like the arbitral tribunals established pursuant to the ICSID Convention,¹ its authority to settle the dispute depends on the sovereign will of the litigants. The very existence of the tribunal will come to an end if the agreement between the parties establishing its jurisdiction is terminated either by a subsequent agreement by the parties or for other reasons, e.g., lapse of time. In such cases, the will of the parties may often lead to a *perpetuatio fori*. Thus, the Permanent Court of International Justice and the ICJ continued to hear and decide cases even after the end of the period for which the respondent had accepted the Court's jurisdiction in virtue of the optional clause. The author finds it remarkable (p. 88) that in all but one of these cases, the Court, on the merits, found for the respondent. In the case of semipermanent instances directly accessible also to private individuals, such termination poses the problem of the fate of cases still pending at that time. In some instances, the tribunal retained authority to wind up such cases; in others, the individual claimant was deprived of the remedy granted to him, e.g., in some minority treaties after World War I. The author mentions this problem (p. 76). A discussion in detail, however, would fall outside his terms of reference.

The author shows hard-boiled realism in doubting whether machinery conceived to enable international adjudicatory bodies to render an award in spite of nonparticipation of the impleaded party will, indeed, end the dispute between the litigants. International adjudication remains based on agreement between the litigants. Therefore, even a permanent international tribunal will lose its jurisdiction in a given case if the case is settled or discontinued. The author rejects (p. 177) the idea advanced, inter alia, by Georges Scelle, that the tribunal should continue the proceedings where the settlement reached would be contrary to international public policy.

According to the author, an arbitration clause will survive the fate of the rest of the treaty concerned. Such survival is said to result from the fact that the jurisdiction of the tribunal is based on an international agreement. According to Article 70(b) of the Vienna Convention on the Law of Treaties, the termination of a treaty does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. The author's reliance on this rule implies that he qualifies an arbitration clause as executed rather than as an executory obligation (p. 93).

¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done Mar. 18, 1965, 17 UST 1270, TIAS No. 609C, 575 UNTS 159.

The author deems it redundant to end a dispute by a consent judgment, unless the parties in a dispute of a commercial nature are contemplating rendering the terms of the settlement executory in domestic courts.

As far as discontinuance is concerned, the author, after a careful analysis of the drafting history of the rules of procedure of the PCIJ and ICJ, and of the amendments thereto, rejects the view that such discontinuance must be based on an agreement between the parties. As long as the respondent party has not yet taken any step in the proceedings, the applicant may end the proceedings unilaterally. Otherwise, the respondent must acquiesce either explicitly or by implication. However, such activity or inactivity of the respondent is said not to amount to an agreement with the applicant (pp. 286-88). To this reviewer, this appears to be a rather formalistic distinction. An order of the ICJ concerning discontinuance is held to be *res judicata* only as to this procedural effect, but not as to the material points at issue between the parties (p. 300). This reviewer has always felt some sympathy with Spain's grievance that Belgium, by discontinuing the first proceedings in the *Barcelona Traction* case after Spain had submitted preliminary objections, gained an unfair advantage over Spain, which by Belgium's application had been induced to unmask its batteries. Again, this preoccupation falls outside the author's terms of reference.

The author, however, had to draw the line somewhere. His comparative effort merits high praise. After having explained the theoretical bases of any settlement and discontinuance, he thoroughly discusses all procedural problems that may arise in efforts to end proceedings by settlement or discontinuance. He begins by commenting on the authority to offer a settlement and ends with the order or consent judgment declaring the case settled or discontinued. For each such step, the author describes the solution found in the rules of procedure of the various tribunals, as well as the practice concerning the relevant rules and their discussion by commentators. He shows that no general principles of international procedural law can be deduced from this material, although there are many parallels in the solutions found by tribunals confronted with more or less similar situations. The field encompassed by the author is very wide and divergent. Yet he fits these elements neatly into the above-mentioned step-by-step system followed in this main part of his book. His deductive impetus leads him sometimes to establish distinctions that may appear hardly relevant to a pragmatic mind. However, insofar as parts of the matters dealt with by the author have been discussed at all by earlier commentators, these scholars, too, were trained in or influenced by the school of legal reasoning developed in Italy and France prior to World War I. Even if the facts of most leading cases thus are banished into the footnotes, Wegen's work is an outstanding contribution to international procedural law and will be a great help to any practitioner, not only in the field of interstate adjudication, but also in the much wider field of international arbitration.

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Die Kompetenzen des UN-Menschenrechtsausschusses im Staatenberichtsverfahren (Art. 40 des Internationalen Paktes über bürgerliche und politische Rechte).
By Hans-Michael Empell. Frankfurt am Main, Bern, New York: Peter Lang, 1987. Pp. viii, 294. Sw.F.65.

This book tries to clarify the meaning of Article 40 of the International Covenant on Civil and Political Rights, which governs the Covenant's most important implementation mechanism: the state reporting procedure. In the first chapter, which serves as the introduction, the author gives some examples of the sometimes far-reaching "general comments" (Art. 40(4)) of the Human Rights Committee. For instance, the Committee has interpreted the right to life (Art. 6 of the Covenant) rather broadly to include a supreme duty of states to prevent wars, stating that the production, testing, possession, development and use of atomic weapons should be qualified as crimes against humanity.

The second chapter discusses whether and to what extent the Human Rights Committee has investigative competence or whether it is limited to requesting and reading the reports prepared by the states concerned (Art. 40(1)(a) and (b)). Another problem is how to deal with incomplete reports. The solution seems to be provided by Article 40(1)(b), according to which "the States Parties undertake to submit reports . . . whenever the Committee so requests." This can be understood as including requests for additional information if an incomplete report has been submitted. According to Empell's rather sophisticated analysis, subparagraphs (a) and (b) of Article 40(1) apply by analogy in case of incomplete reports. The author maintains that the Committee may request reports under Article 40(1)(b) "whenever" the situation in a country implies that there is a particular danger to human rights. He deduces this additional and unwritten requirement under Article 40(1)(b) from the principle of equal treatment of states.

As for the use of information other than that officially submitted by the states concerned, Empell suggests that "studying," as opposed to "examining," excludes any investigative functions. The Committee is limited to the material handed in by the states concerned. The Committee usually invites state delegates to discuss the reports. "Such a representative should be able to answer questions which may be put to him by the Committee and make statements on reports already submitted by his State, and may also submit additional information from his State" (Rule 68, sentence 4). Empell stresses, rightly, that the Rules of Procedure cannot confer any additional competence on the Committee. However, Rule 68 corresponds to an established state practice. Therefore, the author's thesis that only the individual member of the Committee, as opposed to the Committee as an institution, is entitled to discuss the reports with the state delegates seems overly sophisticated. In Empell's opinion, the Committee, as opposed to its members, is limited to taking cognizance of the information provided by the states concerned (p. 100).

Chapter 3 deals with potential reactions of the Human Rights Committee after studying the reports. Three important questions are raised: (1)

whether the term "its reports" in Article 40(4) of the Covenant refers to the reports submitted by the states or whether the Committee may prepare its own reports; and, if the latter, (2) what kinds of reports the Committee may work out; and (3) whether the "general comments" by the Committee include comments addressed to individual states or only comments addressed to the member states in general. Article 40(4) of the Covenant reads in part: "The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit *its reports*, and such general comments as it may consider appropriate, to the States Parties . . ." (emphasis added). On the basis of a convincing analysis of the wording, object and purpose, as well as of the preparatory work, of Article 40 of the Covenant, Empell adheres to the prevailing view that "its reports" refers to reports prepared by the Committee itself.

As for the content of "its reports," the author rejects the restrictive opinion that the Committee may only summarize the reports submitted by the states parties or that these would be identical to the Committee's annual reports. Empell compares the wording of Article 40(4) of the Covenant with the terminology of other humanitarian treaties. Usually, annual reports are clearly referred to as such. He infers that "its reports" includes particular reports by the Committee about the reports submitted by each of the states parties, taking into account the discussion with that state's representative. The reports focus on setting forth the facts, even though, as the author explains, the Committee may evaluate the human rights situation in the country concerned. However, this evaluation must not go so far as to state that there have been violations of the Covenant.

Empell distinguishes between the reports of the Committee and its "general comments" under Article 40(4) of the Covenant. "General comments" certainly exclude comments on concrete individual cases (p. 152). Moreover, the author holds that the preparatory work of the treaty, as well as general practice within the United Nations, supports the position that the term "general comments" was used in order to prevent singling out individual states. A comprehensive comparison with the meaning of similar terminology in other international reporting procedures confirms this view. Empell concludes that Rule 70(3) of the Committee, pursuant to which it may determine "that some of the obligations of that State Party under the Covenant have not been discharged," is void.

The next section deals with the object and purpose of the reporting procedure, which does more than simply provide states an opportunity to inform each other about human rights matters. The author, rather, adheres to the prevailing view that the Committee has supervisory functions. He points out that control is more effective if the reports are as concrete as possible. Therefore, Empell concludes that the Committee may criticize individual member states in its reports, which it has no right to do in its "general comments" (pp. 219, 231). According to Article 40(5), "States Parties . . . may submit to the Committee observations on any comments . . . made in accordance with paragraph 4." Empell applies Article 40(5) by analogy to the Committee's reports. This seems reasonable. The Commit-

tee's reports are of greater interest than its general comments because only the reports may refer to individual states.

In sum, the author has written a thoroughly researched dissertation on the state reporting procedure under Article 40 of the International Covenant on Civil and Political Rights. The book is stimulating because Empell points to so many questions that, probably owing to political considerations, remain unresolved, even though the Committee has now been operating for more than 10 years. His results are based on a careful analysis of the Committee's practice after discussing the different and often conflicting positions of its members and groups of members. The author also draws extensively on the preparatory work of Article 40 of the Covenant and demonstrates many useful parallels with other systems for the promotion or protection of human rights. It would be difficult to find another study on the subject as profound as this one.

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The United States and the Compulsory Jurisdiction of the International Court of Justice. Edited by Anthony Clark Arend. Lanham, New York, London: University Press of America; Charlottesville: The Center for Law and National Security, 1986. Pp. ix, 250. \$26.50, cloth; \$14.25, paper.

Judging the World Court. By Thomas M. Franck. New York: Priority Press Publications, 1986. Published under the auspices of the Twentieth Century Fund. Pp. vii, 112. \$8.50.

These two works are part of the continuing and necessary debate about the attitude the United States should adopt toward the International Court of Justice. Each contains a valuable substantive analysis of the problem, as well as suggestions for the future.

The first of the two works, *The United States and the Compulsory Jurisdiction of the International Court of Justice*, consists of papers and proceedings of a workshop sponsored by the Center for Law and National Security at Charlottesville, which was held in August 1985. In this, as in the second work, *Judging the World Court*, a single-author study by Professor Thomas Franck, the starting point is the fact that the United States continues to be bound by an extensive range of acceptances of the Court's compulsory jurisdiction by reason of the inclusion, in some 60 or so treaties to which the United States is a party, of dispute settlement provisions contemplating compulsory recourse to the International Court of Justice under Article 36(1) of the Court's Statute. As it is not within the power of the United States unilaterally to terminate these undertakings, the debate is limited to the question of the extent to which, if at all, the United States should reinstate its acceptance of the Court's compulsory jurisdiction under Article 36(2), the "optional clause."

The two principal approaches are both reflected in the Charlottesville papers. There are, first, those who favor the reestablishment, though to only a limited extent, of the U.S. acceptance of the optional clause. Thus, Professor Louis Sohn, starting from the position that there should be some U.S. acceptance of the optional clause jurisdiction, proposes a draft declaration that (among other things) would exclude from the Court's jurisdiction not, as in the past, "disputes which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America," but "disputes with regard to matters which, traditionally, in the practice of the United States" have been considered as essentially within its domestic jurisdiction. He also suggests the exclusion of disputes relating to "any question which affects the national security" of the United States or of a state party to a collective security arrangement to which the United States is also a party. A comparable stance is adopted by Professor Fred Morrison, who additionally identifies the need to exclude from the Court's jurisdiction disputes that "are properly exclusively within the jurisdiction of the Security Council." Other suggestions include that of Monroe Leigh to the effect that the United States should limit its acceptance of jurisdiction to cases that are to be brought before specially constituted Chambers.

The opposite school of thought is cogently represented by Professor Michael Reisman. He contends that, among other things, changes in the composition of the Court, the trend of its decisions and the unpredictability of their content warrant the conclusion that "at the present juncture of world policy trends, ICJ development and United States policy, the least destructive course for all concerned is withdrawal from the optional regime."

In his study, Franck pursues in greater detail and with a striking and instructive wealth of information the same general line as the majority of the participants in the Charlottesville workshop. It is both surprising and cheering to be reminded that the administration of Theodore Roosevelt was capable of negotiating no less than 27 agreements providing for the settlement of all classes of disputes by the Permanent Court of Arbitration, and comparably unsurprising to learn that their teeth were drawn by the Senate, which insisted that no case could be so tried without prior senatorial consent. Roosevelt thereupon withdrew the treaties from consideration.

The essence of Franck's study is that the United States needs "a sober inventory that sorts out those areas of United States foreign relations that require unfettered self-determination from those that could benefit from impartial conflict resolution." He concludes, therefore, that the United States should return to the general compulsory jurisdiction of the Court, though subject to a number of important qualifications. The most important would exclude disputes relating to armed conflict and similar or related situations. He also favors the increased use of Chambers and a greater use of the Court for declaring relevant principles of international law rather than firmly and directly resolving specific disputes. He identifies the importance of achieving symmetry, in terms of period of exposure and range of subject matter open to the Court's jurisdiction, between the obligations of the

United States and those of other states seeking to invoke against it the system of the optional clause.

This reviewer has little difficulty in agreeing with the majority view that it is regrettable that the United States as a world power with a commitment to both the existence and the full operation of international law should now be completely outside the operation of Article 36(2) of the Court's Statute; and it seems right to hope that the United States will in the not-too-distant future resume its place among the signatories of the optional clause. But the terms in which it does so must obviously be carefully chosen. Each of the two works under review contains specific proposals centering upon the identification of excluded classes of case. In assessing these, it is important to bear in mind that such exclusions will need to be applied as a preliminary matter, that is to say, at the jurisdictional stage before the Court enters into a consideration of the merits. Consequently, exceptions that are worded in such a way as to require the Court to examine the substance of the case *before* it can decide that it does not have jurisdiction, will not achieve the desired objective, namely, the exclusion of judicial scrutiny of the use of armed force by the United States. Thus, while there can be no objection to the exclusion suggested by Franck of "disputes relating to or connected with facts or situation of hostilities [or] armed conflict" because the identification of such disputes does not involve a detailed assessment of their character, the same cannot be said of the added exclusion of "individual or collective actions taken in self-defense [or] resistance to aggression." In order to decide whether an action was "taken in self-defense," or was by way of "resistance to aggression," the Court would have to look at the whole course of conduct between the parties, not for the purpose of deciding the legality of such conduct but merely for determining that it did not possess the jurisdiction to do so. The wording of the additional reservation, by directly linking the operation of the reservation to a review of the essentials of the episode, would thus appear to be self-defeating.

Both works have stressed the undesirability of "self-judging" reservations because of the possible invalidity with which such reservations may be tainted and the consequent weakening—on this ground and on that of reciprocity—of the declaration of which they form a part. But consideration may perhaps yet be given to the possibility of filing two declarations: one that, while full of positive content, completely excludes "armed conflict"—type disputes from the jurisdiction of the Court; the other, expressed to be without prejudice to the first, containing an acceptance of the Court's jurisdiction in respect of such cases involving armed conflict, etc., as the United States does not determine are, in the particular circumstances, not suitable for the exercise of the jurisdiction of the Court. The separation of this second, more controversial, declaration from the first would avoid any impairment of the operation of the first. Moreover, such a declaration, although admittedly significantly restricted by its limitation to "armed conflict"—type cases, would at least manifest the acceptance by the United States of the application of international law across the board to all its international activities.

The value of the works under review is that they are bound to stimulate constructive thought, whether along the lines just canvassed or along others. Moreover, each is a reflection of how the community of international lawyers in the United States is reacting to an episode that, with inescapable force, has obliged all of us, abroad as well as in the United States, to grapple with a question fundamental to the international order: to what extent does commitment to the rule of law also involve a willingness to accept the adjudication of all disputes?

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Human Rights Missions: A study of the fact-finding practice of non-governmental organizations. By Hans Thoolen and Berth Verstappen. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1986. Pp. viii, 184. Dfl.95; \$44; £31.50.

As foreign policy analysts begin to take the measure of Ronald Reagan's presidency, they will likely take note of a development few would have predicted at the beginning of his first term: the endurance of the human rights initiative launched by Jimmy Carter. Over the course of the Reagan presidency, the notion that human rights concerns have a proper place in U.S. policy has taken firm root—a remarkable development in view of the administration's outspoken hostility toward the principle when it entered office 8 years ago.

As the principle itself gained acceptance, the public debate over human rights policy shifted increasingly toward issues of fact: Do countries that receive U.S. aid respect fundamental rights? Have sanctions been any more effective than "constructive engagement" in promoting human rights in South Africa? Throughout this process, nongovernmental organizations (NGOs) concerned with human rights have played a key role in establishing the facts that policymakers rely upon. There has been an explosion of human rights reporting by NGOs in the 1980s, and these reports have found their way into the front pages of the news, the *Congressional Record* and embassy offices throughout the world.

Human rights reporting has become a distinct profession, but the professionals have not developed widely adopted standards respecting fact-finding procedures or guidelines concerning their reporting of facts. The authors of *Human Rights Missions: A study of the fact-finding practice of non-governmental organizations* seek to identify minimal standards for human rights fact-finding and reporting by NGOs, believing that adherence to such standards would increase the reliability—and hence the credibility—of NGO reporting. The guidelines they propose are based upon their analysis of human rights reports produced by NGOs over a 15-year period.

The research was limited to a statistical analysis of published reports whose preparation included a fact-finding visit to the country concerned.

One hundred eighty-seven NGO reports based upon field research undertaken between 1970 and 1984 were analyzed in accordance with a questionnaire containing 49 questions, further divided into over 100 subquestions.¹ A further 153 reports were collected after the statistical study was completed, but were nonetheless occasionally cited to illustrate points.

The bulk of *Human Rights Missions* consists of a question-by-question analysis of the results of the statistical analysis. The principal findings of the study are summarized near the end of the book, which concludes with recommendations to NGOs based upon the results of the research.

The study's most important limitations were self-imposed. The authors chose not to supplement their examination of the published reports of NGOs with interviews, press articles or any other relevant sources. As a result, the authors frequently acknowledge that their information is inconclusive, and at times they resort to speculation about the practices and deliberations that lay behind the published reports when interviews with NGO staff would have obviated the need to speculate.² Inevitably, some of the inferences drawn from sketchy information contained in published reports miss the mark or are incomplete.³

Some of the issues addressed by the study simply cannot be adequately probed on the basis of information supplied in published reports; this is especially true with respect to methodological questions surrounding the fact-finding process. Human rights reports often address some issues of methodology, but rarely do so in depth or comprehensively. Although the authors may have had to resolve difficult methodological issues in the course of formulating their conclusions, their principal objective in publishing the report typically is to write a persuasive account of the facts they have judged to be true. In this context, the authors may conclude that no substantial purpose would be served by revisiting in the final text the methodological issues that proved most vexing.

The other self-imposed limitation of particular consequence is the authors' decision to rely upon statistical analysis. Professionals engaged in human rights reporting will know that the enterprise has raised a raft of complex and politically sensitive issues that simply cannot be explored adequately through quantitative analysis.⁴

¹ The questionnaires were completed by the researchers on the basis of their own reading of the reports; they were not completed by the NGOs that published the reports.

² For example, noting that few reports refer to preliminary visits to the country in question, the authors speculate that "[i]t is fair to assume that this can be explained to a large degree by budgetary constraints" (p. 99).

³ The authors conclude, for example, that governments are no more likely to cooperate with NGO delegates when contact has been made before the visit than when it has not. To reach this conclusion, they seem to have assumed that NGO reports consistently make mention of advance contacts in cases where they were established. In fact, many NGOs regularly make advance contacts but do not consider it necessary to refer to these in their reports.

⁴ The limitations of the authors' approach are illustrated by the treatment of the practice of issuing press releases during on-site investigations. Applying its statistical analysis approach, the study reports the number of times that published reports indicate that delegates to the country concerned issued a press release during their visit. It does not—and, because of the authors' self-imposed limitations, cannot—explore in any depth the complex issues raised by this practice.

The discomfort of the authors themselves with the limitations they have placed on their study is most apparent in the presentation of their conclusions and recommendations. Much of what they present in these two sections reaches beyond what could be drawn from the results of their statistical analysis. As a result, their conclusions at times appear speculative,⁵ and some of their recommendations will strike the reader as subjective.⁶

This does not wholly detract from the value of the conclusions. Some of the most interesting recommendations—such as the study's final suggestion that human rights NGOs annually publish a listing of countries that continue to deny them entry—cannot be said to have arisen directly from the authors' research.

And, despite the limitations in the authors' methodology, professional fact finders will derive useful insights from the raw data yielded by the study. Some questions of pressing concern to human rights NGOs do lend themselves to statistical analysis, and this study provides valuable information respecting some of those issues. For example, most NGOs do not have a standard practice of submitting reports to the government concerned for its review and comment in advance of publication. The issues surrounding this option are, in fact, a subject of frequent discussion in the board rooms of many NGOs. Their deliberations will be aided by this study's finding that the response rate of governments given the opportunity to respond to advance copies of reports is in the 50 percent range. Similarly, the study's findings concerning the frequency with which international NGOs translate their reports into the language of the country concerned—the rate is low—may prod some NGOs into examining their practice in this regard.

Many of the report's other findings will be of particular value to organizations that do not make a regular practice of human rights reporting but that occasionally undertake such an effort. To cite two examples: the study examines the frequency with which human rights reports (1) include a summary of conclusions separate from the main body of the report, and (2) refer to normative standards, such as those set forth in international human rights instruments, in assessing the practices in the country under study.

⁵ This is especially evident in the report's concluding analysis of the geographical imbalance in NGO reporting on human rights violations. Possible reasons for the imbalance are repeatedly (and necessarily) introduced with language of speculation: "The reasons most likely to be offered by NGO's for not sending missions to other countries are that . . ." (p. 137); "We have the impression that other . . . considerations play an equally decisive role" (p. 138); "Another explanation . . . may be that . . ." (*id.*).

⁶ An example is the authors' recommendation that NGOs make a greater effort to reflect in their reports "[n]uances in the degree of consensus or indications of what were difficult decisions" among mission delegates (p. 136). They offer the following reasoning:

Although the fear for a loss of impact by the presentation of dissenting opinions may be founded on some negative experiences, we feel that the almost total absence of differences of opinion in the reports contributes equally to a loss of credibility. This unanimity becomes particularly unbelievable in cases where large and varied delegations visit a number of countries [*id.*].

Significantly, the authors' research did not include an attempt to determine any correlations between the extent to which a report's conclusions are presented as unanimous and the readers' perceptions of the report's credibility.

Established human rights organizations typically do both, but organizations less experienced in the practice of human rights reporting will benefit from the study's attention to these practices.

As these examples suggest, the study will likely raise the level of deliberate attention to issues of procedure within its target audience, even if the professionals to whom the book is directed disagree with many of its conclusions.

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Human Rights in Internal Strife: Their International Protection. By Theodor Meron. Cambridge: Grotius Publications Limited, 1987. Pp. xiii, 172. Index. £27; \$48.

This volume is an expanded version of the Hersch Lauterpacht Memorial Lectures delivered by the author in March 1986 at the University of Cambridge Research Centre for International Law.

While this reviewer does not agree with the growing tendency to consider 'humanitarian law,' applicable in time of war, and "human rights law," applicable in time of peace, as being two entirely different sets of norms, Professor Meron's book is a welcome addition to the literature on the subject of the protection of the individual in time of civil war or, to use the modern euphemism, internal strife. The author states that his object is "to determine whether there exists a serious lacuna in the area where humanitarian law meshes with human rights law, i.e., in internal strife." He succeeds admirably in attaining that objective.

He begins by discussing in some detail the major areas in which there is convergence of the rules of humanitarian law and the rules of human rights law, listing those areas as (1) the prohibition of torture and cruel, inhuman or degrading treatment or punishment; (2) the prohibition of arbitrary arrest or detention; (3) the prohibition of discrimination on grounds of race, sex, language or religion; and (4) the requirement of the grant of due process. He then gives us areas where the protection granted is unique to one or the other set of norms, or is more far-reaching in one than in the other; some, such as the treaties prohibiting slavery, are of minimal applicability to the modern law of war.

In his discussion of the application of common Article 3 of the 1949 Geneva Conventions, the "mini-convention" relating to armed conflicts not of an international character, Meron states that that article "should no longer be regarded as a legal aberration." Unfortunately, as he points out, states apparently do not agree with that conclusion because of a latent fear that by so doing they will be granting the rebels some sort of recognition and thereby give them some sort of status that they would not otherwise have—this, despite the specific provision in the article by which a state's willingness to apply the humanitarian provisions thereof does not affect the legal status of the opposing sides. The reluctance of France to state that it would apply

Article 3 in the Franco-Algerian conflict, although it was finally overcome,¹ is typical of the attitude of most states when confronted by an organized rebellion.² This is also undoubtedly the reason that the many new African and Asian states lost interest in the drafting of what became the 1977 Protocol II, applicable to noninternational armed conflicts, once the activities of national liberation movements had, by mandate, been categorized as international armed conflicts. It is also the reason, as the author prognosticates, that the prospects for the application of Protocol II are poor. Indeed, going a step further, as of December 31, 1987, nine countries (Angola, Cuba, Cyprus, Mexico, Mozambique, Saudi Arabia, Syria, Vietnam and Zaire) had become parties to the 1977 Protocol I, but not to Protocol II.³

At various places throughout the book, the author discusses the problem of the right of derogation granted by various international instruments and frequently specifies with particularity which norms therein contained are "non-derogable."⁴ Worthy of special mention is the author's statement, which is, unfortunately, all too true, that "[a]buse of the right of derogations is a world-wide phenomenon."

Chapter III is entitled "Pathology of Internal Strife." To the individual interested in understanding the ramifications of "internal strife," or "civil strife" or "civil war," this chapter is required reading. For example, in setting forth the problems that have evolved in the various attempts to define the term "internal strife" (and its synonyms), Meron points out how the extent of the opposition's organization, the duration of the strife, the intensity of the violence, the political motivation involved, and so on, are all factors that must be taken into account. Departing for the moment from the "humanitarian law-human rights law" thesis, he discusses the related definitional problems of the Overseas Private Investment Corporation (OPIC), a creation of the United States, and of the Multilateral Investment Guarantee Agency (MIGA), a creation of the World Bank, both of which are concerned with defining with adequate specificity the type of internal strife that is to fall within the ambit of their insurance coverage. Unfortunately, the use of a term such as "civil disturbance" in the MIGA contract, even though understood as meaning internal strife, is bound to cause confusion since the Diplomatic Conference that drafted Protocol II attempted to ensure that it would not be applicable to "internal disturbances."⁵

After discussing the role of the International Committee of the Red Cross (ICRC) in internal strife (ch. IV) and some of the innumerable meetings of experts seeking solutions to the various problems created by the existence of internal strife (ch. V), Meron ends his presentation with a chapter on "The Need for Remedies." Here I must disagree with the interpretation that he

¹ M. BEDJAOU, *LAW AND THE ALGERIAN REVOLUTION* 213 (1961).

² The situations in Nicaragua, El Salvador and Afghanistan are discussed at pp. 47-50.

³ International Committee of the Red Cross, Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: Signatures, Ratifications, Accessions and Successions as at 31 December 1987.

⁴ See, e.g., pp. 23-26, 51-63, etc.

⁵ Art. 1(2), 1977 Protocol II, *reprinted in* 16 ILM 1442, 1443 (1977).

has placed on three ICRC statements. He says that "internal strife is not covered by the existing humanitarian instruments" and that this has been acknowledged by the ICRC. If "internal strife" means what this reviewer would call "civil war," and that appears to be the substance of the entire book, then internal strife is covered by both common Article 3 of the 1949 Geneva Conventions and by the 1977 Protocol II, as Meron himself has cogently pointed out. Concerning the ICRC statements, the first is contained in a quoted report submitted by the ICRC to the 25th International Conference of the Red Cross where reference is made to "situations of internal tensions or unrest which are not covered by international humanitarian law"; the second is a footnote reference to a 1984 report of experts "concerning the protection of victims of situations not covered by international humanitarian law"; and the third is a speech given in 1983 by the then ICRC President, Alexandre Hay, in which he refers to "violence that ranges from simple internal tensions to more serious internal disturbances" (p. 136).⁶ A close examination of all three of these documents makes it abundantly clear that what the authors are concerned with is not internal strife as understood throughout the book, but with what Article 1(2) of the 1977 Protocol, in excluding them from its coverage, refers to as "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature." There is no question that these situations, which fall far short of being internal strife, are not covered by existing international humanitarian law; and it is exceedingly doubtful that any state will become a party to an international instrument that permits international intervention in situations that every state, without exception, would consider to be exclusively a matter of domestic concern.⁷

Despite the foregoing difference of opinion, this reviewer recommends Meron's book without reservation.

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Perestroika. New Thinking for Our Country and the World. By Mikhail Gorbachev. New York: Harper & Row, 1987. Pp. 254.

Perestroika was written very quickly by its busy author (and probably some ghostwriters) in the summer of 1987. That fall, publication started on an unprecedented worldwide scale in many languages. The U.S. edition was launched at the Soviet Embassy in Washington in November.¹ Publication in other languages followed and, in February 1988, even a Chinese "mass edition" was given its send-off at the Soviet Embassy in Beijing.² So far,

⁶ Hay, *The ICRC and International Humanitarian Issues*, INT'L REV. RED CROSS, No. 238, Jan.-Feb. 1984, at 3, 9.

⁷ For support of this position, see the negotiating history of Article 1 of Protocol II in H. LEVIE, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 23-90 (1987).

¹ Pravda, Nov. 5, 1987, at 11.

² Pravda, Feb. 26, 1988, at 7. Pravda, Mar. 26, 1988, at 4, reports on a second Chinese edition, a Spanish and an Arabic one.

Gorbachev's book, which, as he states (p. 10), was written at "the request of American publishers," has been a tremendous financial success—200,000 copies of the Dutch edition alone were sold in the first 3 months.³ A totally different question is what influence this book, written in a very popular style, will exert on the world and especially on Western public opinion.

The book has two parts: the first, "Perestroika," is mainly devoted to its application at home, and the second, "New Thinking and the World," is devoted to international relations. This review will focus on part 2, some 120 pages. Writing in this *Journal*, one is tempted to start by noting that Gorbachev, a graduate of the Law Faculty of the University of Moscow, although writing about contemporary international relations, does not, even once, refer directly to international law; the term simply cannot be found, even where one would most expect it, e.g., in the reference to "asserting civilized standards in international relations" (p. 132). Nor is the main post-World War II treaty—the United Nations Charter—referred to at all, although the United Nations, and "its experience of streamlining international cooperation" is mentioned as "more important than ever before" (p. 140). The above may lead one to a pessimistic conclusion about the role played by international law in top-level Soviet thinking (and the impact Soviet law schools have on their students in that field!).

Regarding the premises for the Soviet "new thinking" in international relations, the book mentions such factors as the threats posed by nuclear weapons, environmental pollution, limited natural resources, the scientific, technical and information revolution, and problems of starvation, indebtedness and poverty in the Third World. All of this gives rise to a state of global interdependence. What one misses very much, though, is any clear admission that the main necessity for Soviet *perestroika*, in international relations as well as domestically, arises out of the catastrophic economic and social conditions that the ossified, dogmatic and corrupt Brezhnev regime brought about in the USSR. It was only in February 1988 that Gorbachev himself made this devastating statement:

As is known, the speed of economic development in our country has decreased and reached a critical point. But even that speed, as it has now become clear, was achieved in great part on an unhealthy basis . . . oil trade on the world market at the high prices then prevailing, and the totally unjustified promotion of the sale of alcoholic beverages. If one purges the economic growth indicators of the influence of these factors, it transpires that during the period of, effectively, four five-year plans, we did not have an increase in the absolute growth of the national income, and at the beginning of the eighties it even started decreasing.⁴

This deep economic crisis, resulting in the Soviet Union's increasingly falling behind the West, was (and still is) coupled with social evils like drunk-

³ Pravda, Feb. 20, 1988, at 4. Pravda, Mar. 26, 1988, at 4, reported that in Italy the book "still firmly holds first place on the list of the most popular publicistic books in the country."

⁴ Speech at Plenum of Central Committee of the CPSU, Pravda, Feb. 19, 1988, at 2.

eness on a scale greater than ever before in Russian history and unheard-of environmental pollution. There was incredible waste, some of it catastrophic, such as the loss of 10 to 12 million hectares of prime agricultural land that, according to Gorbachev, was inundated to construct power stations.⁵ The costly, and totally unsuccessful, intervention in Afghanistan, which, despite initial illusions, has dragged on for years, affecting millions of Soviet people, as well as other factors, demands radical revision of certain policies at home and changes in the country's approach to foreign policy. Considerably more funds must be directed toward internal reconstruction, even at the expense of "internationalistic aid" (as the intervention in Afghanistan used to be called) or of gigantic armament. There is also a desire to lure Westerners into joint ventures and to create an international climate propitious to more liberal imports from the West of "sensitive" technology. These, one strongly feels, are the most likely reasons for *perestroika* in Soviet thinking in international relations, much more so than concerns about the future of mankind, which is what the book tries to convey.

However that may be, one should now turn briefly to the promises made in *Perestroika*, intended to substantiate the alleged Soviet "new thinking" in international relations. One must distinguish between (1) the offer vis-à-vis the West and (2) what is in store for the members of the Eastern bloc. In the first, there is the promise of less militant relations. On page 147, the reader is reminded that the new 1986 program of the Communist Party of the Soviet Union (CPSU) abandoned the concept that "peaceful coexistence" is a specific form of the international class struggle.⁶ There are declarations of a certain readiness to compromise "on equal terms." One reads that "we want to return to the true, original meaning of the words we use in international contacts. In declaring our commitment to honest and open politics, we do mean honesty, decency and sincerity" (p. 158) and, as Gorbachev maintains, "we follow these principles in our actions."

There is also repetition of such well-known principles, vital to international security, as equality of states and recognition of the right of every nation to "choose its own social system" (pp. 142-43, 226-27), which boils down to recognition of fundamental principles of international law. For the West, there is hardly anything new, let alone "revolutionary," in all this [*perestroika* is supposed to be "a revolution," p. 49]. At most, Westerners may feel that such pronouncements by a Soviet leader confirm the political will to follow international obligations legally entered into by having become a state party to the UN Charter, the two International Covenants on Human Rights and other international agreements. But one must bear in

⁵ At a meeting with leaders of the "mass media, ideological institutions and creative unions." Prayda, Jan. 13, 1988, at 2.

⁶ The previous program of the CPSU (1961) read:

Peaceful coexistence forms the basis for peaceful competition between socialism and capitalism on an international scale, and represents a specific form of the class struggle between them. While the socialist countries pledge themselves consistently to peaceful coexistence, they aim at unremitting strengthening of the positions of the socialist world system in its contest with capitalism.

mind that "every nation's" right to choose (and change) its sociopolitical system does not, in Soviet thinking, refer to every nation *tout court*, but only to every "non-socialist nation"—while you are welcome to switch from capitalism to Moscow-brand socialism, there is a clear *nyet* to movement in the opposite direction.

We must now have a look at whether *perestroika* offers "new thinking" to the smaller countries of the "Soviet bloc," especially the six members of the Warsaw Treaty Organization. Here it must be said at the outset that the self-criticism offered by the author on the character of past relations is minimal and extremely general. Concerning earlier periods, probably mainly under Stalin, one reads:

Drawing on the Soviet experience, some countries failed duly to consider their own specifics. Even worse, a stereotyped approach was given an ideological tint by some of our theoreticians and especially practical leaders who acted as almost the sole guardians of truth. . . . As regards our friends in the socialist countries, they usually kept quiet, even when they noticed something of concern. Frankness was frowned upon, and could be "misunderstood," so to speak [pp. 162–63].

Concerning the situation at the eclipse of the Brezhnev era, one reads the following: "Indeed, beginning with the end of the 1970s, contacts between leaders of fraternal countries became more and more for show rather than for real business. There was less trust in them and their approach was more businesslike" (p. 164).

The worst aspect of these relations, the most flagrant breaches of international law by the USSR, are evidently to be considered all right. As to aggression or the threat thereof toward allied Warsaw Pact countries, Gorbachev simply states:

Some socialist countries went through serious crises in their development. Such was the case, for instance, in Hungary in 1956, in Czechoslovakia in 1968, and in Poland in 1956 and then again in the early 1980s. Each of these crises had its own specific features. They were dealt with differently [p. 163].

What about the so-called principles of proletarian and socialist internationalism in relations with the smaller members of the "family"? What about those perversions of international law by Moscow, the "new and higher" kind of Communist "regional international law," with its notions of "*socialist* self-determination," "*socialist* sovereignty" and the "right and duty" to intervene, even militarily, whenever Big Brother feels that "socialism is threatened"? They have not been abandoned, or even criticized.

"Proletarian" and "socialist internationalism" are not referred to by name in *Perestroika*. But one reads: "It goes without saying that no socialist country can successfully move forward in a healthy rhythm without understanding, *solidarity* and mutually beneficial cooperation with the other fraternal nations, or at times even without their *help*" (p. 161) (including "invasion help"? (emphasis added). Although later it says that "the entire framework of political relations between the socialist countries must be

strictly based on absolute independence" (p. 165), just a few lines below one reads that "we are also firmly convinced that the socialist community will be successful only if every party and state cares for both its own and *common* interests" (emphasis added).

Lest one be totally confused or—worse still—carried away by the "absolute independence," one has to refer, in the final instance, to the CPSU program of March 1, 1986, adopted under Gorbachev. It is *this* document, meant to stay in force for decades, that is binding, and not what the General Secretary of the day says in a book. And here the party program is crystal clear. It confirms, in one place, "the construction of relations with other fraternal countries on the principles of socialist internationalism."⁷ Elsewhere, it pronounces that "[i]n its relations with the fraternal parties the CPSU adheres firmly to the principle of proletarian internationalism, which organically contains within itself both revolutionary solidarity and the acknowledgement of the full independence and equality of each party."⁸ In yet another place, the party program sums it up: "In its whole activity the CPSU unswervingly directs itself by the tried-out Marxist-Leninist principles of proletarian, socialist internationalism."⁹

The matter is thus settled in accordance with very "old thinking." Should a "critical" situation develop, should Moscow, for instance, feel that one of the six countries of the Warsaw Pact is drifting toward Finlandization, there is no doubt that, though the level of tolerance would probably be higher than before, military force would be used as the *ultima ratio*.

On page 169, Gorbachev relates how, during his 1987 visit to Czechoslovakia, while talking to people on the street, one young man noted: "So it boils down to: 'Speak the truth, love the truth, and wish others the truth.'" I added: 'And act according to the truth. This is the most difficult science.'¹⁰ The obvious problem is that some truths may be highly unpalatable and even "counterproductive" politically. As the caption of a cartoon in the leading Polish Marxist weekly *Polityka* went: "So what if it is the truth—if this truth runs against us?" Marxist-Leninist "dialectical relativism" certainly also applies here just as in the field of *glasnost*. As Gorbachev himself stated: "we are for *glasnost* without any provisos, without limits. But for *glasnost*—in the interests of socialism."¹¹

If truth is applied as a yardstick, *Perestroika* shows serious gaps, partially by omission, partially by commission. Concerning the first, one does not find even one instance of bold self-criticism in international relations (in contrast to domestic questions). There is, for example, not one word about the destructive role played in so many countries by the Moscow-controlled Comintern (1919–1943). There is no word about the secret protocol to the Ribbentrop-Molotov treaty of August 23, 1939 (still not acknowledged, let

⁷ Program of the CPSU in *KOMMUNIST*, No. 3, 1986, at 142.

⁸ *Id.* at 148.

⁹ *Id.* at 152.

¹⁰ Recounting this episode, *Pravda*, Apr. 10, 1987, also prints a passage where Gorbachev, answering a voice from the crowd that says the truth should be heard, stated: "The truth, the truth, otherwise you will not get anywhere. When there is no truth, it is unclear what to do."

¹¹ *Pravda*, Jan. 13, 1988, at 2.

alone published, in the USSR). As is known, this secret protocol gave the green light for Soviet aggression against Poland and Finland, as well as for the annexation of the Baltic countries and parts of Romania. Concerning the post-World War II era, the West is still presented as totally responsible for the "Cold War" and, in this connection, the question is posed with sanctimonious naïveté: "We also ask why the West was the first to set up a military alliance, NATO" (p. 149). Soviet treatment of Hungary, Czechoslovakia and Poland between 1956 and 1981, and the lack of any trace of self-criticism on all that, was mentioned above. The same lack applies to Afghanistan, where the freedom fighters are, incidentally, still called "counter-revolutionary bands" (p. 177). Under these circumstances, one must recognize as very "old thinking" (and tactics) what one reads on pages 202-03: "It is high time to put an end to the lies about the Soviet Union's aggressiveness."¹²

Perestroika, in its international aspects, seems much influenced by Lenin's 1920 brochure written in connection with the preparations for the second congress of the Comintern, "*Left-Wing*" Communism—*An Infantile Disorder* (not mentioned in the book). Two short quotations seem particularly appropriate: "the entire history of Bolshevism, both before and after the October Revolution, is full of instances of changes of tack, conciliatory tactics and compromises with other parties, including bourgeois parties!" And: "We must be able to . . . agree to make any sacrifice, and even—if need be—to resort to various stratagems, artifices and illegal methods, to evasions and subterfuges . . ."¹³

Part 2 of *Perestroika* is a good illustration of the application of the teachings of the Master. There are even heavy-handed attempts (in spite of a denial) at driving a wedge between Western Europe and America:

Sometimes . . . one has the impression that the independent policies of West European nations have been abducted, that they are being carried off across the ocean; that national interests are farmed out under the pretext of protecting security. A serious threat is hovering over European culture too. The threat emanates from the onslaught of "mass culture" from across the Atlantic [p. 208].

What is envisaged is the potential creation of a sort of international "people's front" of Communists with other leftist and even center parties, something that the Comintern tried to arrange in the midthirties in Western Europe on a national scale. There is even talk (if the teachings of the book are followed) of the prospect of a "golden age" for the whole world (p. 252)!

"Peaceful coexistence," as already mentioned, is now supposed to be devoid of elements of the international class struggle. But anyone who believes that this means, according to the "new thinking," that Moscow now

¹² Speaking of lies, consider the following by former Soviet Minister of Defense Sokolov, in *Pravda*, Feb. 23, 1987, at 2: "The whole heroic history of the Soviet Armed Forces confirms the consistency of their lofty destiny—to defend the socialist Fatherland. They have not attacked anybody in the past." See, in the same vein, the present incumbent, Yazov, in *Pravda*, Feb. 23, 1988, at 2.

¹³ V. I. LENIN, *SELECTED WORKS* 543, 554 (1968).

accepts the idea that the West's socioeconomic status will remain basically unchanged for generations to come, is wrong. *Perestroika* does not, of course, declare that the West, according to Communist doctrine, is doomed anyway. But the 1986 program of the CPSU very traditionally declares that "[t]he general crisis of capitalism is deepening," and that "[i]mperialism is parasitical, decaying and moribund capitalism, the eve of the socialist revolution."¹⁴

What *Perestroika* offers on international relations is, on most points, very old and conservative, or ambiguous and unconvincing. But if this is so, then the *only* proof of genuine "new thinking" must lie in hard facts. And here, serious doubts must be registered. In 1954–1955, Khrushchev, without proclaiming a new era or publishing a bestseller, simply demonstrated practical "new thinking" and corrected many anomalies in Soviet foreign policy, to mention only some territorial decisions: giving Port Arthur back to China, signing the State Treaty with Austria and withdrawing Soviet troops from there, and relinquishing the naval base in Porkkala to Finland. In the case of Gorbachev's stewardship, 3 years in duration at this writing, there have been, as yet, few such acts. Military withdrawal from Afghanistan started in May 1988, but, apart from that, there are still "proxy soldiers" occupying Cambodia, unsettled Chinese and Japanese territorial claims, and many problems of a different character. A positive step of considerable caliber has been taken in the field of disarmament. But when thinking about the INF Treaty between the United States and the USSR, one should not forget the 1963 multilateral Test Ban Treaty, concluded under Khrushchev. Of course, new progress in nuclear disarmament may follow. But the build-up of conventional forces continues unabated under Gorbachev and, "perhaps most disturbingly of all, the Soviets have continued to build up their capability to conduct offensive operations."¹⁵ There has been no practical application, so far, of what *Perestroika* advocates as to the "purely defensive character" (pp. 142–43) of the Warsaw Pact's military doctrine proclaimed by the Pact's summit in May 1987.

A relatively small but symbolic manifestation of "new thinking" vis-à-vis the rest of the world would be a change in the Soviet emblem. Recall that the present emblem, as described in Article 169 of the 1977 Soviet Constitution, "consists of a representation of a sickle and hammer against the background of the globe . . . with an inscription . . . 'Proletarians of All Countries, Unite!'" The handle of the sickle encompasses part of Western and Central Africa and the blade itself covers the Middle East and the hammer Europe. This emblem, symbolizing Communist expansionist ambitions worldwide, would hardly be tolerable in the basic law of a peace-loving country and continues to represent very old thinking.

Another serious problem is the lack of official admission of the murder of up to 15,000 Polish officers at Katyn and other places in 1940; apologies must be made, compensation paid to the victims' families and other steps taken.

¹⁴ Program, *supra* note 7, at 106, 109.

¹⁵ Galvin, *The INF Treaty—No Relief from the Burden of Defence*, NATO REV., Feb. 1988, at 2, 3.

New thinking must also be demonstrated in the interpretation of what is "essentially within the domestic jurisdiction of the Soviet government." During the Brezhnev era, human rights issues were considered off-limits to "foreign interference." In *Perestroika*, Gorbachev states: "I have said . . . that we are prepared to discuss in a humane spirit individual cases, but we are also determined to openly and extensively discuss the entire range of these problems" (i.e., human rights) (p. 205). Nonetheless, though progress may be noted in this realm, when it comes to Western broadcasts in the languages of the USSR, which, most of the time, center on broadly conceived human rights problems, and whose reception in the USSR must be treated, per se, as a realization of Article 19(2) of the International Covenant on Civil and Political Rights, they are attacked by Gorbachev as "the inflammatory American broadcasts from Munich" (p. 217). He lashed out at Western "radio voices" again in February 1988.¹⁶ Shortly thereafter, escalating "old thinking," a "decisive protest" regarding the Voice of America was lodged by the Soviet Ministry of Foreign Affairs with the U.S. Embassy.¹⁷ Western countries do not object to Soviet broadcasts in their languages. Nor should Moscow object to the reverse, if it wants anybody to believe what *Perestroika* says: "we criticize ourselves the way nobody has ever criticized us, West, East or anywhere else . . . because we are strong and we do not fear for our future" (p. 129).

A few final words. *Perestroika* in international relations, the offer of "civilized standards," "honest and open policies," etc., would, per se, sound encouraging. Unfortunately, coming, as it does, from a country that has demonstrated for decades so many actions counter to these principles and flagrant breaches of international law, it cannot be taken at face value. Concrete and meaningful international actions must take place. No "benefit of the doubt," no *in dubio pro Kremlo*, is warranted.

The book, as this review has tried to demonstrate, often lacks intellectual honesty and confirms ongoing "old" thinking in many places. It is very superficial, clearly written in haste to "inundate" the foreign public as quickly as possible. Some of its boasts are utopian, such as the claim that the success of *perestroika* at home would also "help the developing countries find ways to achieve economic and social modernization without having to make concessions to neocolonialism or throwing themselves into the cauldron of capitalism" (p. 131). There is also, in places, a certain tone of the self-appointed *praeceptor mundi*. It is already evident in the book's subtitle (its Russian original even reads "New Thinking for Our Country and the *Whole World*" (emphasis added)).

In February 1988, Gorbachev made this revealing admission, which one would look for in vain in this book: "I also have to stress: new thinking is based on Lenin's theory of imperialism, on V. I. Lenin's research on the nature of imperialism, which will never become 'good.' On this question we have not had and do not have any illusions."¹⁸

¹⁶ Pravda, Feb. 19, 1988, at 3.

¹⁷ Pravda, Mar. 1, 1988, at 5.

¹⁸ Pravda, Feb. 19, 1988, at 3.

We, too, should harbor no illusions. Some improvement in the direction of more dialogue, more "civilized international standards" and limited disarmament may, in fact, be demonstrated by the other side. But genuinely peaceful and fully secure "coexistence" based on far-reaching confidence and good will, a "golden age," is difficult to imagine. For this, the very nature of the beast would have to be changed—an impossible dream!

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Vancouver, B.C.

The Distinctiveness of Soviet Law. Edited by F. J. M. Feldbrugge. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1987. Pp. xix, 272. Index. Dfl.185; \$91; £56.95.

A search for distinctive approaches to international law, sometimes called "comparative international law," is now routine among scholars specializing in ideological and regional attitudes toward the discipline. Pluralism arrived soon after World War II when the "socialist" camp became a major factor in the United Nations. Western statesmen no longer dominate the development of international law, or even its codification. This volume is to be welcomed as a well-informed effort of Western Sovietologists to discern the new trends.

As might be expected, the compendium of papers, selected from those presented to the Third World Congress for Soviet and East European Studies in 1985, is primarily devoted to socialist municipal law. International law norms are treated only as they concern extradition, judicial and administrative assistance, consular law and foreign trade law. In spite of this weighted balance, the volume is not without interest for readers of the *Journal*, for both Easterners and Westerners have often taken the position that foreign policy is but an extension of domestic policy. Marxist attitudes are not divided between external and internal application, even though the drama of exporting revolution seemed to survive well after the fire of revolution had gone out of Soviet domestic policy. Today, Mikhail Gorbachev has brought the external and domestic policies into balance, as he swings his support to UN peacekeeping to calm the world's tumult while the restructuring process at home is pressed.

Regrettably, the volume contains no contributions from Eastern Europeans or Chinese. The absence of inside evaluations of distinctiveness to be compared with those from the outside is not critical since Westerners now know a great deal about what is written by the socialists. It is known that all are not of one mind, for two schools have been vocal: one arguing that distinctiveness is so great that a new "socialist international law" has emerged, and the other denying such an evolution in spite of some variation in practice between East and West.

Dr. Henn-Jüri Uibopuu provides some indication of varying approaches, for he is himself an Estonian, long resident in Salzburg as a professor of

international law. With his command of both Eastern and Western attitudes, his view is important when he concludes that Soviet consular law conforms to general international norms, even though it recognizes in its consuls much greater authority over Soviet nationals in the receiving state than classical law allows.

Extradition practice as exemplified in the treaties concluded suggests some variation to its author, Karin Schmidt of Cologne. Here the contrast is in attitudes toward political crime: the East recognizes no barrier to extradition within the socialist family of states, but when Western states are concerned, treaties draw the classical line. Yugoslavia, with its fence-sitting location, provides the variation. It recognizes no right to extradite political offenders, but the receiving state is always authorized by treaty to decide what is political.

Foreign trade law and its socialist variation are treated by Peter B. Maggs of the University of Illinois with his usual careful hand. Of course, all students of Soviet law know that state trading has left a heavy mark on institutions and practice. Indeed, Soviet authors have long stressed the distinction in infrastructure and contract law because of the state monopoly of foreign trade in the East. Maggs treats the steps in the development of infrastructure and concludes that one clear basis for it stands out: the Communist Party is determined to prevent foreigners from intervening either ideologically or institutionally in its monopoly of policymaking. Lenin distrusted capitalist traders, and his heirs have until recently shown no change of mind. Today, with joint ventures and in some socialist countries 100 percent foreign investment, the early Leninist rule can hardly remain intact.

The noted Dutch editor of the volume, who has already done so much through his Documentation Center in Leiden to provide studies on socialist law, has now added a thought-provoking series of papers on "distinctiveness."

JOHN N. HAZARD
Board of Editors

Osvobodivshiesia strany i mezhdunarodnoe pravo (The Liberated Countries and International Law). I. P. Blishchenko (chief ed.). Moscow: Mezhdunarodnye otnosheniia, 1987. Pp. 264. \$3.75.

The colonial powers and, notably, the United States are made the scapegoats for the tragedy of the developing world in this first textbook to be published by the Lumumba University of Friendship of Peoples. Although a Western reader might have expected the book to be published in a language accessible to many of the Third World's peoples, it is printed, so far as indicated, only in Russian. This suggests that it was designed only for foreign students in the USSR who are being prepared to convey its message to their fellow students after their return home.

In spite of its sharp propagandistic tone, it incorporates a remarkably full record of the measures sponsored over the past 20 years by Soviet scholars

and diplomats to restructure international law to suit the perceived needs of the Third World. This academic attentiveness to a record of notable facts might have been expected of an editorial committee headed by Dr. I. P. Blishchenko of the Soviet Ministry of Foreign Affairs and his two "readers," the noted Ukrainian international lawyer, I. I. Lukashuk, and his colleague, G. P. Zadorozhnyi of the Moscow State Institute of International Affairs. These are all very knowledgeable jurists.

Western scholars no longer overlook the lamentable state of the colonially oriented body of international law prior to the 1950s, but some will quarrel with this Soviet presentation. For example, it notes that although Japan and Europe lay in ruins after World War II, the war "did not hamper American concerns in profiting from war orders and shipments of goods, nor hamper banks from transforming the U.S.A. into the greatest world creditor" (p. 89). Not a word is said about the Marshall Plan's contribution to the reconstruction of Europe, a plan that was also offered to Eastern countries, but declined.

Praise is showered on the United Nations and some of its organs. Readers with long memories will recall the unending criticism of the United Nations by Eastern European statesmen until majorities began to appear in favor of Soviet initiatives. But there is no praise for financial agencies or the International Court of Justice. The authors take the traditional line of attack on these as being dominated by the West. Perhaps the support of the Soviet Union for dispute resolution by the International Court of Justice, its application for observer status in GATT and possibly even membership in, and support of, UN peacekeeping activities was too recent for the authors to digest and include.

Some hint of affirmative attitudes to the varied activities of the United Nations is given in a paragraph reading, "Art. 1, para. 3 of the Charter and other democratic provisions, set forth in the Charter, have made it possible to transform the U.N. into a leading international instrument of struggle, first against political colonialism, and, second, also against neocolonialism and foreign exploitation" (p. 93).

The lengthy chapter on the "New International Economic Order" (pp. 70-102) gives Western readers more of a basis for understanding its proposals than many other sources that omit detail. Third World students are told that opinions vary on what this program can achieve to satisfy their dreams. Apparently, there is a position that calls for radical restructuring of the economic life of the world through total abandonment of market economics, to be replaced by obligatory planning of world trade so as to favor Third World suppliers of raw materials. At the other end of the spectrum, there is a view favoring a less radical approach within the market system.

The authors seem to suggest to their students some caution in pressing their ideas, so as to avoid backlash. As they state,

The deepening and democratization of the international law of collaboration must not conflict with international law [presumably, contemporary general international law]. In particular, socialist international law does not conflict with general international law, which is at the

current time the most advanced form of development. So also the law of development does not deny the existence of general international law, but, emerges from it. It furthers the affirmation of social justice in interstate relations, legitimating the struggle of peoples for real equality, against economic dictatorship of the imperialist powers and their multinational corporations [p. 85].

This book may have been written too early, for today's Communist Party preaches cooperation, not struggle, and to the extent that struggle is to be carried on by the developing world, it must be kept within the framework of "law," rather than taking the nihilistic approach to regulation that was once favored.

In sum, this text can be helpful to Westerners trying to learn what is being taught foreign students in Soviet universities, and it can cast light upon what those students are expected to do when they return to their homelands. It draws the curtain away from a program that, until now, has not been so clearly explained to Western readers.

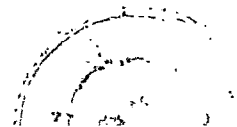
JOHN N. HAZARD
Board of Editors

Soviet Year-Book of International Law, 1986. Moscow: Publishing House "Nauka," 1987. Pp. 391. 5 rubles, 40 kopeks.

Academician G. I. Tunkin is celebrated on his 80th birthday in this 28th volume of the *Year-Book*, and well he might be, as founder of the Soviet Association of International Law and initiator of the *Year-Book* series, former member of the International Law Commission and member of the Institut de Droit International, and as formulator of the concept of an "international law of peaceful coexistence." For the Western world of internationalists, as well as for his colleagues, Tunkin has for decades been accepted as spokesman for Soviet academics, and even for Soviet diplomats, on suitable international law solutions for problems touching on Soviet interests.

His career is reviewed by his colleague R. A. Mullerson in a jubilee article. He places Tunkin with the two early architects of a Soviet philosophy of international law, E. B. Pashukanis and E. A. Korovin, and as a contemporary of V. N. Durdenevskii, V. M. Koretskii, F. M. Kozhevnikov, S. B. Krylov, D. B. Levin and M. Ya. Rapoport in developing the field. Mullerson sees Tunkin's major contribution of recent years as a redefining of international law as the product of a coordination of wills. Westerners will know that in developing that theory, Tunkin broke out of the straitjacket created by Pashukanis, who saw international law as a product of the will of the bourgeois ruling class, to be utilized by Soviet diplomats with care, on a "pick and choose" basis. Tunkin set the stage for the development of international law in a new era of vigorous innovative participation with Western scholars and diplomats in coordinating wills.

Tunkin himself leads the authors who present papers in this *Year-Book*, as he has done throughout most of the years of the *Year-Book's* publication. For



his jubilee, he has chosen to argue again for the renunciation of ages-old stereotypes of thinking and conduct in international life. He calls for the adoption of a model built upon the premise that peace is an indispensable condition for the survival of humanity and that law must prevent warfare, which would destroy mankind. As always, he adheres to the Communist Party program's position that peaceful coexistence does not require the cessation of class struggle for the minds of men. He continues in his paper to strike hard at "imperialists" and, most of all, at the United States. He has never been one to see the beam in his own country's eye. For him, the entry into Afghanistan was stimulated by an American threat to Soviet security.

In the same *Year-Book*, a colleague discloses one of the forms of struggle for the minds of men when he tells of a summer school conducted for diplomats of the developing world. It seems that the Foreign Office legal adviser, Dr. I. P. Blishchenko, served as dean in 1985 of a program that brought together 86 jurists from 41 countries to hear lectures on international law. A hint as to what they heard has been provided recently by a textbook edited by the dean. The substance of this book has been set forth in a review of the text in this *Journal*.¹ For Westerners, it will be seen as a continuation of the "struggle" approach.

As has been the case in prior years, the *Year-Book* contains many technically oriented articles of considerable value to Westerners searching for clues to current Soviet thinking. Two notable papers suggest measures to be taken during armed conflict to protect civilian objects. S. A. Egorov notes that there is no code covering either attacks from the air on objects in the sea or attacks from outer space. He is worried about attacks on nuclear power stations and nuclear ships, probably mindful of Chernobyl. V. Yu. Markov argues that oil spills have proven dangerous and that they would be worse if caused by military action. He proposes the creation of an International Committee on Neutralization of offshore fields and suspension during war of deliveries from them to belligerents.

Canadian and U.S. jurists will welcome praise for the use of a Chamber of the International Court of Justice to resolve their dispute over the boundary in the Gulf of Maine. This praise may suggest proposals for Chamber resolution of disputes in which the USSR is a party. Western scholars know that M. S. Gorbachev has sounded friendly toward use of the ICJ in recent comments, and the Chamber approach may be a way of narrowing the bench to judges thought to be impartial. Yu. V. Osintsev also praises the Chamber's search for "equity" in resolving the dispute, rather than relying on hard law. He even permits himself to say that the decision could be accepted as a precedent despite the specific exclusion in the Statute of the Court of the common law view that its decisions may be precedents. For the author, precedents may in some cases fill lacunae in the law.

Finally, G. A. Matveev's paper on proposals for revision of the Paris Convention on Protection of Industrial Property can be helpful to counsel advising clients who are entering upon joint ventures with Soviet enter-

¹ See review in this issue at p. 887.

prises. He argues that the "author's certificate," normally issued to Soviet citizens instead of a traditional patent, must be accepted on the same basis as patents in establishing priority in invention. He proposes amendment of the Paris Convention to put this principle in writing.

Tunkin must take satisfaction in the performance of his colleagues in the *Year-Books*. He has stimulated extensive writing in international law, as the bibliographies at the end of each *Year-Book* prove. The annual meetings of the association of which he is president bring together jurists from Eastern Europe as well as those of the USSR. If the current trend toward active participation in all phases of the work of the United Nations and its agencies continues, there may be a lessening of the "class struggle" approach in international law.

JOHN N. HAZARD
Board of Editors

Repertório da Prática Brasileira do Direito Internacional Público. 2 vols. By Antônio Augusto Cançado Trindade. Vol. IV (1899–1918): pp. 518; vol. V (general index): pp. 235. Brasília: Fundação Alexandre de Gusmão, 1986–1987.

With the publication of volume IV of his digest of Brazilian international law, Professor Cançado Trindade completes a solo task of monumental proportions. The fifth volume is a complete index of the four volumes that constitute the digest. It is worthy of note that this is the first digest published in Latin America or, to be more precise, in the Southern Hemisphere, and it is to be hoped that the example will be followed in other countries.

The volume under review covers the period 1899–1918 and is of special interest not only to experts in international law, but also to students of Brazil's diplomatic history, since Baron Rio-Branco, the country's foremost diplomat, headed the Ministry of Foreign Relations from 1902 until his death in 1912. During those 10 years, the annual report of the Foreign Ministry was abolished, and therefore many of the documents published are of special interest. The volume also covers the First World War, and the positions taken by Brazil as a neutral and as a belligerent are of special interest.

As in the previous volumes,¹ the book is divided into nine separate parts. In the introduction, the author writes that the most important chapters deal with space in international law, e.g., territory, international rivers and the law of the sea. The chapter on international rivers shows that in the beginning of the century the issue was of the utmost importance; conversely, the law of the sea was of scant interest.

The chapter on the codification of international law shows how codification progressed in Latin America. The first important steps were taken under the aegis of the inter-American system and culminated in the Conven-

¹ Reviewed by Edith Brown Weiss at 79 AJIL 1131 (1985).

tion on Private International Law and in conventions on diplomatic agents, consuls and treaties, all of which were signed at the 1928 Havana Conference. The first proposal made, in 1899, during the conference held in Mexico City, was put forward by the Brazilian delegate, José Hygino Duarte Pereira.

The speech made by Ruy Barbosa during the 1907 Peace Conference in The Hague, in which he defended the sovereign equality of states, is considered the most important Brazilian contribution to international law. It was received on that occasion with skepticism but is, at present, enshrined in the Charter of the United Nations.

This digest, like the previous ones, has frequent recourse to the opinions (*pareceres*) of the legal advisers of the Brazilian Ministry for Foreign Relations. Even though there are doctrinal misgivings regarding this source of international law, it should be stressed that most of the legal advisers whose opinions are mentioned were outstanding jurists in international law, such as Clovis Bevilacqua, Hildebrando Accioly and Haroldo Valladao; all were authors of important books on international law and their opinions quite often were capable of modifying the stand that the government was contemplating on a given subject.

Considering the importance of Cançado Trindade's digest, one can only wonder why the fourth volume only goes back as far as 1899 when, in this reviewer's opinion, it would have been more logical to begin with the proclamation of the Republic in 1889. During those 10 years, many important events took place and, from a legal point of view, the resolution of the question of the rights of Brazil to the Island of Trindade in the mid-Atlantic, in 1896, is of special interest.

Finally, reference must be made to the general index in volume V, which examines the four previous volumes and has the added advantage of containing translations in English and French of the indexes. I feel that Cançado Trindade should take one more step forward and publish an abridged version of the four volumes in English since it would reach a much larger body of readers than the Brazilian version.

With the completion of the digest, Cançado Trindade, who is the author of many books and articles on international law, can be expected to take his place among the principal experts on international law in Latin America.

G. E. DO NASCIMENTO E SILVA

Guojifa Xin Lingyu Jianlun (A Concise Introduction to the New Areas of International Law). By Shen Yu and Wei Jiajui. [Changchun]: Jilin People's Press, 1984. Pp. 272.

Guoji Jingifa (International Economic Law). By Liu Ding. Beijing: Chinese People's University Press, 1984. Pp. 426.

Guoji Shangfa (International Commercial Law). 2 vols. By Shen Daming, Feng Datong and Zhao Hongxun. Beijing: External Trade Education Press, 1985. Vol. 1: pp. 360; vol. 2: pp. 240.

Guoji Shuifa (International Tax Law). By Liu Longheng. Beijing: Current Affairs Press, 1985. Pp. 167.

Guoji Touzifa (International Investment Law). By Yao Meizhen. [Wuhan]: Wuhan University Press, 1985. Pp. 451.

Guoji Huobifa Gailun (Introduction to International Monetary Law). By Shen Yu. Beijing: Law Press, 1985. Pp. 289.

Guoji Maoyifa (International Trade Law). By Shen Daming and Feng Datong. Beijing: Beijing University Press, 1985. Pp. 454.

The renewed Chinese interest in international law in the post-Mao period¹ is motivated by China's four modernization programs. One of the major means chosen to achieve modernization goals is to attract foreign investments, by introducing foreign technology transfer to China, forming joint ventures, conducting joint exploration of natural resources and expanding foreign trade. As a result, in addition to traditional public international law, Chinese scholars have begun to develop an interest in international economic and business law.

"A Concise Introduction to the New Areas of International Law," by Shen Yu and Wei Jiajui, contains 10 chapters, dealing respectively with the international law of development, international monetary law, international antitrust law, international product liability law, international environmental law, international economic organization law, international travel and tourism law, atomic energy law, international criminal law and legal problems of international arms control. While in the West the international law of human rights has become a popular subject, it is not even mentioned in Shen and Wei's book.

Liu Ding's "International Economic Law" deals primarily with international trade and technology transfer, but it also analyzes in detail legal problems relating to joint ventures and their protection under Chinese law and international law (pp. 261-380). Shen, Feng and Zhao's "International Commercial Law" is a textbook used for teaching college students majoring in international trade. The authors attempt to compare continental European and Anglo-American laws on international contracts, sales, agency, commercial organizations, negotiable instruments, carriage of goods by sea, marine insurance, industrial property, trade dispute arbitration and litigation involving foreign elements. Several important international trade conventions concluded under the auspices of the United Nations are also discussed and analyzed. Liu Longheng's "International Tax Law" is a concise discussion of the Chinese tax system as it applies to foreigners, the tax systems of the United States, Japan and a few Asian countries, and certain international tax agreements.

A comprehensive discussion of international investment law is provided in Yao Meizhen's "International Investment Law." Aside from providing an

¹ For details, see Chiu, *Chinese Attitudes Toward International Law in the Post-Mao Era, 1978-1987*, 21 INT'L LAW. 1127 (1987).

introduction to the investment policy, laws and guarantee systems of capitalist countries, this book discusses in detail socialist countries and China's policy and legislation on using foreign capital (pp. 95-204). Unfortunately, the book only deals briefly with the subject of how to settle foreign investment disputes in China (pp. 447-51).

Post-Mao China has participated in the International Monetary Fund, the World Bank, the International Development Association and the International Finance Corporation. It no longer rejects foreign borrowing for short-term or long-term purposes. However, there are very few Chinese works that deal with international monetary problems, especially their legal aspects. Shen Yu's "Introduction to International Monetary Law" fills this gap. It is primarily concerned with introducing the international monetary system—its organization, exchange controls, banking and related problems—to the Chinese reader, though in a few places, it also discusses briefly the Chinese foreign exchange system, the settlement of accounts and the gold reserve policy (pp. 63-66, 76-77 and 219-20).

Shen and Feng's "International Trade Law" deals with both private and public law aspects of international trade. It is divided into four parts and 14 chapters. Part 1 covers international sales of goods, including problems relating to contracts, shipping, insurance and payment. Part 2 discusses problems of international transfer of technology such as the concepts of industrial property, trademark and patent protection, and methods of transferring technology and licensing agreements. Part 3 deals with foreign trade control, trade agreements, the General Agreement on Tariffs and Trade and capitalist countries' antitrust or similar legislation. The last part covers the settlement of international trade disputes and includes a concise discussion of the Chinese law and practice in this area.

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Xiandai Guojifa Jichu (Foundation of Modern International Law). By Qiu Zaiyu and Zhang Jincao. [Baoding]: Hebei University Teaching Materials Section, 1984. Pp. 316.

Guoji Gongfa (Public International Law). By Zhu Lisun *et al.* Beijing: Central Broadcasting Television University Press, 1985. Pp. 373.

Guojifa Gailun (Introduction to International Law). By Hu Wenzhi *et al.* [Hanzhou]: Zhejiang People's Press, 1986. Pp. 350.

Guojifa Gailun (Introduction to International Law). By Wei Min *et al.* Beijing: Guangming Daily Press, 1986. Pp. 413.

The first standard college textbook on international law published in the People's Republic of China appeared in 1981.¹ Several new textbooks have

¹ GUOJI FA (International Law) (Wang Tieya & Wei Min eds. 1981), reviewed by Hungdah Chiu in 77 AJIL 977 (1983).

come out since then. Qiu and Zhang's "Foundation of Modern International Law" is a textbook published for the use of law students at Hebei University. It contains 13 chapters, dealing respectively with the concept, nature, sources and relations between international law and municipal law (all grouped in the introductory chapter), fundamental principles, subjects, territories, law of the sea, airspace and outer space, residents (individuals), diplomatic and consular relations, law of treaties, international organizations, international economic law, peaceful settlement of international disputes and law of war and neutrality. The contents of Zhu Lisun's "Public International Law" are similar, except that there is no chapter on international economic law. Zhu's book is used for television college programs, so it has a printing of 153,000 copies and thus is the most widely distributed text on international law in China. Hu's "Introduction to International Law" has contents similar to Qiu and Zhang's book. Wei's "Introduction to International Law" omits chapters on international economic law and law of war and neutrality; however, it does treat each of its subjects in more depth. Wei's book is used for self-study programs of the People's Republic of China, but its first printing was only 12,600 copies.

While the contents of these books are generally similar to those of certain introductory books on international law published in the West, they all deny that individuals are subjects of international law (Qiu and Zhang, pp. 49-50; Zhu, p. 48; Hu, pp. 49-50; and Wei, pp. 74-79) and emphasize that state sovereignty is one of the fundamental principles of international law. All four books occasionally deal with certain Chinese practices of international law such as the nationality question, and they support Chinese positions on certain international issues such as condemning Vietnamese intervention in Cambodia. For teaching purposes, it appears that among the four textbooks, Wei's book is the best written. It also contains an extensive bibliography for further study, a list of dates when countries established diplomatic relations with the PRC and a list showing Chinese participation in multilateral conventions.²

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Balance of Payments Adjustment, 1945 to 1986: The IMF Experience. By Margaret Garritsen de Vries. Washington: International Monetary Fund, 1987. Pp. xi, 336. Index. \$14.50.

Margaret Garritsen de Vries has written alone, or with others, three fat multivolume books on the International Monetary Fund, covering the years 1945-1965, 1966-1971 and 1972-1978, plus a single volume of synthesis

² For a more complete list of conventions with China's participation, see Chiu, *Chinese Attitudes Toward International Law in the Post-Mao Era, 1978-1987*, 21 INT'L LAW. 1127, 1154-158 (1987).

covering the entire period 1945–1985. The book under review addresses one aspect of the Fund's work, balance-of-payments adjustment, which may be the prime issue faced by the Fund (p. 1). It combines analysis of the theory of such adjustment, especially as economists working on the Fund's staff have helped to shape and extend that theory, with a running account of adjustment problems of industrial and developing countries as they appeared to the Fund. There are many references to the longer studies: in chapter 6, for example, nine of 20 footnotes refer to Mrs. de Vries's earlier work (sometimes with colleagues). There is heavy quotation from IMF reports, speeches, studies and meetings. The book has a fairly extensive bibliography, appendix tables and suggestions for further reading.

It is a little hard to say whether the book is intended to be read straight through or to serve as a reference for particular subjects. For one who begins at the beginning and plows ahead, it should be noted that it can be read at two levels: as economic history, and as the history of economic thought on balance-of-payments adjustment. The economic history is to a considerable extent what was called in my youth "upsy-downsy"; this exchange rate or balance-of-payments surplus went up, that went down. The history of economic thought begins after World War II with the creation of the Fund and pays little or no attention to the automatic adjustment process thought to have existed under the price-specie-flow mechanism or the gold standard. Nor does it pay particular attention to the enormous literature produced outside the Fund. For example, there is no mention of Robert Triffin's *Gold and the Dollar Crisis* (1958), and the devaluations of sterling in 1949 and 1967 are dealt with in a few pages without reference to Alec Cairncross and Barry Eichengreen's *Sterling in Decline* (1983).

The basic problem facing the Fund has been the differences in view between the industrial countries, on the one hand, and the developing countries, on the other. In the former, deficits in balances of payments are for the most part the consequence of mistaken macroeconomic policy, and should be corrected by an exchange-rate change in the event that overvaluation arises from inflation, by reducing expenditure on consumption, investment and government (together called "absorption," meaning absorption of resources), or by restraining or reducing the money supply. Developing countries, in contrast, believe in "structural" deficits that arise in part from exogenous or outside events rather than domestic policy mistakes. The Fund and de Vries started out very partial to the three macropolicy schools—based on "elasticities" (the exchange rate), absorption (spending) or the money supply. During the period of fixed exchange rates, they wanted correction to take place first through fiscal and then monetary contraction. When, after 1971, this seemed not to have brought correction, and floating exchanges replaced the par-value system with which the Fund had started in 1946, they moved to dependence on elasticities introduced by floating exchange rates. This strong view is a little curious, however, since the Fund spent the first decade or so after its foundation on the sidelines, while the burden of moving to balance-of-payments adjustment was carried by the Marshall Plan, a program of assistance explicitly relying upon structural

adjustment. There were economists in 1947 and 1948 (and a revisionist school has appeared today) who said that the balance of payments of Europe could readily be corrected by curbing inflation and adjusting the exchange rate—in its vulgar form, balancing the budget and devaluing to the purchasing-power-parity level. For the most part, however, both economists and governmental authorities relied on a diagnosis that stressed structural change.

The developing countries today, as for the last 40 years, insist that their troubles are not homemade but come from abroad, and that they are the result of declining export prices (terms of trade), restricted markets in the industrial countries, sharp increases in the prices of such a commodity as oil (in 1973 and 1979), and so on. They want more resources, and they want them unconditionally. De Vries states explicitly that she is not writing a book on conditionality, but the pressures of the Fund to restrain spending, control money supplies and insist on correction of overvalued (and multiple) exchange rates, and the resistance of developing countries to the Fund's "grandmotherly" scolding of them, are set forth at length.

Perhaps the greatest interest in the book is the Darwinian fashion in which this Cartesian instrument grew. The Fund was established with limited facilities, divided into fifths, available at limited intervals in limited amounts. First, there was the long delay from 1946 to perhaps 1958 before operations could really get going—in contrast with the originally contemplated 5-year transitional period. Bit by bit, more resources were drawn in by the General Arrangements to Borrow, and outside the Fund's jurisdiction, the swap arrangements of the Basel Agreement. Stand-by agreements provided for future contingencies, and back-to-back joining of separate tranches allowed increased borrowing. As new problems arose, new sorts of drawings were allowed: Compensatory Financing, the Special Drawing Right (a failed initiative that some observers now want to bring back), the Supplementary Financing Facility, the Structural Adjustment Facility, the Oil Facility, the Extended Fund Facility and the like. The Articles of Agreement originally provided for fixed exchange rates, alterable only under special conditions. With the breakdown of this system and the move to floating exchange rates, the Fund has successively worked on target zones, policy coordination, trigger consultations and surveillance.

I find particularly interesting an account of Managing Director H. Johannes Witteveen's speech of April 1976, warning the commercial banks and the borrowing developing countries on using bank credit to meet balance-of-payments deficits (pp. 128–29). His warning went unheeded and most historical accounts of the problem regard it as having surfaced for the first time in 1982 with the Mexican debt crisis. Even if the Fund recognized the signs of a forthcoming problem, the steps taken to meet it, and especially its recurrence in the second half of 1986 (pp. 257 *ff.*), have a painful ad hoc quality, involving loans from the Fund, the World Bank, the Inter-American Bank and commercial banks. Moreover, the initiative in the recent past seems to have passed from the Fund as such to the (now former) U.S. Secretary of the Treasury, James Baker. On page 284, the author notes that

for developing countries, policy changes may be needed to raise current aggregate output, to change the structure of output, to increase rates of savings and investment, and to improve the return on investment. Changes would conceivably be needed not only in exchange-rate policy, but also in pricing policies, income policies, trade policies and specific aspects of taxation or public spending policies. A tall order! She goes on to say that the framework for determining these policies was undeveloped, which left "considerable scope for more thinking about the general strategy of adjustment programs, especially over the medium term." There is little comfort in that judgment.

In conclusion, two nitpicks: on page 81, the author states that in the absence of a good reserve asset, countries used the dollar. This reveals a failure of understanding. Throughout modern history, a leading currency has been used as both a vehicle and a reserve currency. Using the same currency—the Venetian ducat, Amsterdam rix-dollar, British pound sterling and U.S. dollar—for both purposes saves transaction costs, that is, it is economical. I do not mean to pin this misunderstanding specifically on de Vries: it is and has been general. But it involves a misunderstanding.

Secondly, and less substantively, I take strong exception to the expression on page 94, "infinitely more difficult." One could more concisely use the word "impossible."

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International Trade and the Tokyo Round Negotiation. By Gilbert R. Winham. Princeton: Princeton University Press, 1987. Pp. xiv, 449. Index. \$45, cloth; \$13.50, paper.

Gilbert Winham's definitive work on the GATT Tokyo Round (1973–1979) stands as a worthy sequel to Ernest Preeg's landmark study of the Kennedy Round (1963–1969).¹ Preeg's study gave a history of the negotiations, an analysis of the results and an evaluation of the significance of the Kennedy Round for future trade policy. By contrast, Winham spends far more time on the mechanics of the negotiation, how negotiating positions evolved and the horse-trading that took place.

Despite the successful conclusion of the Kennedy Round, an accumulation of unsolved problems soon threatened the liberal trading regime that was forged in the GATT agreement of 1947. As Winham notes: "On the trade side, the problem was not so much with the system as with an accumulation of injurious policy actions taken by various nations against the interests of others." The central task was to negotiate methods to make old rules apply more fairly, and to avert a pattern of retaliation that would unravel the fabric of the trading system. The trade setting of 1973 was thus very much like the trade setting of 1988.

¹ E. PREEG, *TRADERS AND DIPLOMATS: AN ANALYSIS OF THE KENNEDY ROUND AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE* (1970).

In terms of size, the ensuing Tokyo Round was quite simply the largest commercial negotiation ever held. In terms of substance, it was the most important commercial negotiation since the early postwar conferences that constructed the Bretton Woods system. Prior GATT trade negotiations had dealt almost exclusively with tariff cuts and did not penetrate protectionism behind the borders. By comparison, the Tokyo Round exposed nontariff problems, even when it did not redress them.

The fact that Winham examined the Tokyo Round through the lens of political science means that, even in a very long book, many aspects get short shrift. There are no tables of trade statistics, no before-and-after tariff rates. There is no room for legal analysis. The subject matter of the six Tokyo Round codes is summarized in a bare eight pages in Appendix B.

Instead, Winham gives a very detailed phase-by-phase, subject-matter-by-subject-matter, account of the negotiating process. Chapters 3–7 are the heart of the book: “The Negotiation Launched, 1973–1974” (ch. 3), “Early Phase, 1974–1977” (ch. 4), “Middle Phase, 1977–1978” (ch. 5) and “End Phase, 1978–1979” (chs. 6 and 7).

Winham places the Tokyo negotiations in the larger setting of commercial policy since the 1930s—essentially the political economy of mercantilism. In this setting, negotiators represent producer interests, even though the greater purpose of their efforts—besides the thrill of the bargaining table and the delight of elegant cuisine—is consumer interests. Above all, each negotiator is mindful that his personal reputation depends on a “successful” outcome. Pity the forgotten negotiators who spent long years toiling on the failed Safeguards Code!

Some episodes are particularly well told. Chapter 7 gives an excellent exposition of the historical and political intricacies of the complex U.S. nontariff measure known as the “wine gallon” tax. Another example: at various points, Winham recounts Robert Strauss’s bag of negotiating tricks. One memorable story recalls the ambassador’s delivery of the so-called Strauss list of agricultural priorities, penned on the tablecloth of the Intercontinental Hotel in Geneva, to the horror of the maitre d’, and the dismay of Finn Gundelach.

This is a book for both academic specialists and trade practitioners. It makes timely reading for those who will carry the Uruguay Round to its middle and end phases—especially the political ambassadors who will step into the shoes of Grey, Haferkamp, Strauss and Ushiba.

GARY HUFBAUER

International Criminal Law. Volume II: Procedure. Edited by M. Cherif Bassiouni. Dobbs Ferry: Transnational Publishers, Inc., 1986. Pp. xvii, 552. Indexes. \$60.

International Criminal Law. Volume III: Enforcement. Edited by M. Cherif Bassiouni. Dobbs Ferry: Transnational Publishers, Inc., 1987. Pp. xvii, 313. Indexes. \$35.

These are the last two volumes of Professor Bassiouni's three-volume series on international criminal law. (Volume I, *Crimes*, was reviewed in an earlier issue of this *Journal*.¹) As stated in the introduction to each volume, Bassiouni's declared purpose in presenting the work is "to provide the scholar, researcher, practitioner and student with the necessary basis of understanding this important subject." Admittedly, "every topic contained in these volumes is not exhaustively covered."

Keeping in mind the caveat he himself has noted, Bassiouni has successfully achieved his purpose. His focus is on the *lex lata* rather than *de lege ferenda*, and both volumes are more descriptive and analytical than critical of existing law and practice. The result is more an encyclopedia of international criminal law than a treatise.

Volume II (*Procedure*) covers extradition, prisoner exchange treaties and other means by which individual states cooperate to enforce both national and international criminal law. (Bassiouni refers to these means as "the indirect enforcement method.") Volume III (*Enforcement*) is concerned with "the direct enforcement model," i.e., the practice of international criminal courts. Both volumes include articles and essays by the editor and other authors as well as reprints of treaties, UN reports and other primary source materials.

Volume II is the most successful of the series, and will be of more interest to the practitioner than volumes I or III. Jurisdiction, extradition, transfer of prisoners, recognition of foreign penal judgments, taking evidence abroad and other topics related to international cooperation in penal matters are all touched upon in this volume. While each chapter has a different author, the editor has done an admirable job of tying these diverse essays into a unified and comprehensive volume. As in the first volume of the series, the work is strengthened by the inclusion of many primary source documents such as the European Convention on Transfer of Prisoners and U.S. statutes on extradition.

The law and policy of the United States are the chief focus of volume II, with Western European laws and agreements receiving almost equally comprehensive treatment. Discussion of Eastern European positions comes in a poor third.

From a purely American perspective, of course, the topics discussed in this volume include matters that have undergone exciting changes in the last 15 years. These developments include the negotiation of the first prisoner exchange treaties, the subsequent negotiation of bilateral agreements for international cooperation in penal matters, the elimination of the "political offense" exception in certain extradition treaties and the reevaluation, in the context of antiterrorism legislation, of the historic opposition of the United States to the passive personality principle of jurisdiction.

Though a few of these developments (e.g., the revision of the "political offense" provisions of the U.S.-UK extradition treaty) occurred too recently to be discussed in this work, most have been covered in a thorough and

¹ 81 AJIL 510 (1987).

scholarly manner. On a few topics, such as the U.S. law of international prisoner exchange, this volume is virtually the only treatise to deal with the matter.

Eastern European law is primarily represented by a valuable chapter surveying "Socialist" positions on jurisdiction, extradition and other aspects of international penal cooperation, written by Professor Gardocki of the University of Warsaw. This short article gives the reader a fascinating comparative look at topics not normally covered even in Western works on Eastern European law. Unfortunately, the look is little more than a glimpse.

Taken as a whole, volume II will be a valuable resource for scholars and students, and for those practitioners who find themselves faced with an occasional international criminal law problem. A specialist in international trade law, for example, might well need to consult this work when a client is suddenly faced with a question involving the effects and application of the European Convention on the International Validity of Criminal Judgments.

Volume III is the weakest of the three. One would expect that a work dealing with "the direct enforcement model" of international criminal law, through international prosecution before an international court, would look mainly to the future and focus on the problems and prospects for the success of such a model. Less than half of this volume is concerned with such issues, however, and this half consists (except for a five-page introduction by the editor) solely of reprints of documents from international organizations.

It is undeniably valuable to have access to these otherwise hard-to-find reports. Documents from international organizations are, however, notoriously subject to political considerations in the course of their drafting. This part of the volume would have been much more useful if these documents had been supplemented by commentaries from qualified scholars, both proponents and skeptics on the issue of an international criminal court. The approach of including both primary source documents and academic commentary is consistently followed elsewhere in these three volumes, and it is not clear why the editor chose to depart from this practice in part 2 of volume III.

Part 1 of volume III deals with historical examples of international prosecution. It also suffers from problems, but of a different nature from those that afflict part 2. The articles and essays in part 1 are generally thought-provoking and of high academic quality. Noteworthy, in this regard, are Bassiouni's essays on crimes against peace and crimes against humanity, and Professor Bierzañeck's treatment of the history of the definition of war crimes.

The problem is that this material has little to do with enforcement, the announced theme of the volume. Most of the essays in this part deal with the definition of offenses and other issues of substantive law, issues previously covered in volume I of this series. There may be a sound basis for placing this material in volume III, rather than in volume I, but the criteria governing that decision are not readily apparent. Those doing research on substantive aspects of war crimes, crimes against humanity and crimes against peace would be well-advised to consult both volumes. Similarly, Jordan

Paust's fine survey of American military practice on the defense of superior orders, and Christine van den Wijngaert's succinct essay on statutory limitations, are both more concerned with problems encountered in the national enforcement of international law than they are with the practice of international courts. They would thus have been more appropriately included in volume II, with other discussions of the "indirect enforcement method," than in volume III.

Volume III is at its weakest in its treatment of the International Military Tribunal for the Far East (the Tokyo Trial). In the context of the Pacific war, this Tribunal dealt with many of the same issues as the International Military Tribunal at Nuremberg, as well as with a number of interesting matters not raised at Nuremberg. Here, however, its work has been relegated to a two-page "Editor's Note," from which we learn little beyond the fact that Bassiouni does not think highly of the Tokyo Trial.

While the editor obviously has strong feelings about the Tokyo Trial, we are given almost no analysis to support them. He cites only two sources, both secondary, for the conclusion that the Tokyo Trial had a "decisively political flavor" and is, unlike Nuremberg, an example of "victor's justice." He charges the presiding judge with a lack of impartiality and the chief prosecutor with presenting questionable evidence, without providing examples of either type of impropriety. The note fails to mention that the defense succeeded in convincing the Tribunal to dismiss a significant number of the charges (though no defendant at Tokyo was acquitted of all charges).

In the documentary appendix, the editor quotes five pages (out of 1,200) from the majority judgment at Tokyo and 20 from Justice Roling's dissent. Again, this selection is skewed against the Tribunal's majority. It certainly does not give the reader an adequate basis for forming an independent opinion of the Tokyo Trial.

One reason given for this negative attitude toward the Tokyo Trial is that General MacArthur, as Supreme Allied Commander in occupied Japan, had a large role in setting up the Tribunal, approving the charges, appointing the judges and choosing the defendants. All that was true. The Charter of the Tribunal was, in fact, promulgated as a General Order issued by MacArthur. (The point is made because the "Editor's Note" erroneously suggests that the Charter of the Tokyo Tribunal was part of an international agreement, like the Charter of the International Military Tribunal at Nuremberg.²)

By singling out the Tokyo Trial for criticism on this basis, the "Editor's Note" may leave the erroneous impression that other Allied war crimes tribunals were not similarly constituted. In reality, most Anglo-American war crimes tribunals (called "military commissions" by the Americans and "military courts" by the Commonwealth countries) were set up in much the same way in both theaters of war. The local Allied military commander

² The Charter of the International Military Tribunal for the Far East is reprinted in *DOCUMENTS ON PRISONERS OF WAR* 312 (H. Levie ed. 1979). For what it may be worth, a recent account of the Tokyo Trial by a journalist who covered it for United Press indicates that MacArthur was not personally enthusiastic about the trial. A. BRACKMAN, *THE OTHER NUREMBERG* 74 (1987).

selected the court members, convened the court, approved the charges and the accused, referred cases to trial and reviewed the findings and sentence. The source of these practices was not political prejudice. Rather, they were adopted by analogy to the court-martial procedures used in the British and American armed forces.

Finally, volume III displays evidence of hasty editing. As an example, an entire chapter seems to have been dropped from part 1, leaving behind a few enigmatic traces. "Chapter One" of part 1 is entitled "International Prosecution." Where part of a work is designated "Chapter One," the reader would expect a "Chapter Two" to follow. (Otherwise, why divide the work into chapters?) Here, there is nothing labeled "Chapter Two." After the documentary appendixes to chapter 1, however, there is a brief essay by Professor D'Amato entitled *National Prosecution for International Crimes*. Is this the elusive "Chapter Two," or at least an introduction to it? It certainly does not seem to belong in a chapter on international prosecutions, and if it is part of chapter 1, why does it appear after the appendixes? On the other hand, there would appear to be a lack of balance in a work that has a first chapter of 146 pages and a second chapter of 10 pages.

Again, in the documentary appendixes to part 1, chapter 1, the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity is wrongly titled the "Convention on the Nonapplicability of Statutory Limitations to War Crimes Against Humanity." This error appears both in the document itself and in the table of contents.

A certain number of typographical and textual errors are likely to appear in any volume of over three hundred pages. Where a work purports to reprint primary reference documents, however, the reader is entitled to assume that special care has been taken to ensure that those are accurately reproduced. A major error in the title of such a document must raise doubts about the accuracy of the documentary appendixes as a whole.

All in all, however, the weaknesses of volume III do not significantly undercut the value of the series as a whole. It should be noted that volume II is fully capable of standing alone as a reference work. Practitioners and others with little interest in the more theoretical aspects of international criminal law might well consider buying only that volume. Those who have a broader interest in the history, development, theory and current status of international criminal law will want to have access to the entire series. For them, all three volumes are recommended.

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The Antarctic Treaty regime: Law, Environment and Resources. Edited by Gillian D. Triggs. Cambridge and New York: Cambridge University Press, 1987. Pp. xxi, 237. \$54.50.

This volume contains papers prepared by 15 authors for the "Whither Antarctica?" Conference, sponsored in April 1985 by the British Institute of

International and Comparative Law. Collectively, these assessments by highly qualified experts ably elucidate the tangled nexus of legal, political and resource problems that complicate contemporary Antarctic affairs. As such, the book is a welcome addition to an expanding literature.¹

The work is organized into five substantive parts, each of which is introduced by a brief, yet perceptively informative, commentary by the editor, Gillian Triggs. Part I deals with the physical environment and scientific research in the Antarctic. In the initial chapter, D. J. Drewry comprehensively sets out the geographical situation and geophysical structure of the Antarctic region. The acquisition of greater geological knowledge about Antarctica in a resource-hungry world is assuming increasing importance. This thesis undergirds the contribution by R. M. Laws, who discusses scientific opportunities within the context of geophysical and biogeographical processes in the Antarctic. As Professor Laws plainly explains, the fragile ecological situation in the Antarctic is likely to influence the future course of scientific research there toward conservation and wise management of resources.

Legal issues affecting the Antarctic Treaty regime are treated in part II. Here the dilemmas associated with sovereignty in the Antarctic are articulated: who, if anyone, owns what territory, where, under what legal conditions, and with what attendant legal rights, on and offshore the continent? R. Trolle-Andersen supplies a useful, lucid analysis of the legal and political elements underpinning the Antarctic Treaty system. His conclusion is politically salient: Antarctica today remains a natural preserve of international peace and cooperation, a political reality engendered by the Antarctic legal regime. It would be imprudent, he concludes, to abandon this proven system hastily for some untried, more universal international regime. Similarly, Francisco Orrego-Vicuña examines the utility of the Antarctic Treaty system as an alternative for regulating resource-related activities in the region. As he rightly posits, the system of Antarctic agreements furnishes several demonstrated advantages for the international community. These include the openness of the Treaty to universal accession, its operation for unlimited duration, its preservation of the region as a nonmilitarized, nuclear weapons-free zone of peace, its inclusion of an on-site inspection system, its multiple efforts to protect the Antarctic environment, and its specific facilitation of international scientific cooperation and exchange of information. Professor Orrego-Vicuña makes compelling the argument that participation in Antarctic decision making is not arrogated as a right of certain states; rather, it has accrued to them from their acceptance of specific obligations over activities in the region. The Antarctic Treaty system thus should properly be viewed today as an evolving international organization, though it lacks much sophisticated institutionalization. As such, it has actually been strengthened, rather than debilitated, by the recent debate

¹ As indicated in the introduction, impetus for the present volume came from publication of the papers in *ANTARCTIC RESOURCES POLICY: SCIENTIFIC, LEGAL AND POLITICAL ISSUES* (F. Orrego-Vicuña ed. 1983).

over Antarctica and its governing regime. That is, the UN debates since 1983 have prompted the Antarctic Treaty Consultative Parties (ATCPs) to rethink and reevaluate their stake in the Antarctic Treaty system. The unmistakable upshot has been to convince them that the Treaty and its family of agreements was worth preserving. That remains a fundamental point not to be lost sight of in contemporary Antarctic affairs.

Of what relevance is Antarctica to the lawyer? Hazel Fox addresses this query from four stages of legal thinking that reveal ample opportunities for the international lawyer. As Lady Fox observes, Article IV of the Antarctic Treaty presents the most intriguing conundrum to the lawyer in that it provides a legally binding political compromise of delicate balance between select claims of sovereign territoriality and international nonrecognition of those assertions to title. Her thoughtful analysis of that double-edged provision, coupled with the distinct possibilities of some commercial development on the continent, the likelihood of ensuing jurisdictional conflicts and the patent need to clarify how private international criminal law applies to the continent, highlights prominent challenges that international lawyers will have to meet in devising a more practicable legal system for Antarctica.²

Complications that arise from conflicting juridical positions over sovereignty on the continent have compounded and protracted recent negotiations on Antarctic resources and environmental preservation. Gillian Triggs seizes upon this theme as she analyzes "some jurisdictional problems" relating to the Antarctic Treaty system. Critical issues treated include difficulties stemming from the "purgatory of ambiguity" associated with Article IV; legal questions regarding offshore jurisdictional rights in coastal zones; jurisdictional complications posed by a future International Sea-Bed Authority; problems of jurisdiction over Antarctic living marine resources; the limited participation in decision making under the Antarctic Treaty regime; and the implications underpinning the application of an approach to the region based on the principle of the "common heritage of mankind." Her discussion and assessments are well reasoned, balanced and insightful, and the issues are clearly presented. The main message gleaned from Professor Triggs's treatment, as well as from several other essays in the volume, is that problems do exist in the present Antarctic Treaty system, but that any reform by the Consultative Parties should proceed slowly, with patient circumspection and caution. So long as governments work through the present Treaty system to fashion a regime that protects the Antarctic region, the entire international community benefits. If the past is prologue, that deduction may be a fair appraisal.

The third part of this volume concerns protection of the Antarctic environment. John Gulland assesses the Antarctic Treaty system as a resource management mechanism, specifically by focusing on the Convention on the

² Potential problems associated with private international criminal law in Antarctica are not substantively discussed in this treatment. For a lucid account, see Carl, *The Need for a Private International Law Regime in Antarctica*, in *THE ANTARCTIC LEGAL REGIME* 65 (C. Joyner & S. Chopra eds. 1988).

Conservation of Antarctic Marine Living Resources (CCAMLR). Effective resource management patently remains dependent upon obtaining agreement from the parties on shared objectives and then acquiring adequate technical and scientific information on possible outcomes of management alternatives. As Dr. Gulland observes, Antarctic Treaty states are bound, in concerted interest and joint responsibility, to manage living resources south of the Antarctic convergence. Failure to cooperate fully in these efforts, as in the present case of the CCAMLR, undermines the practical prospects for effecting a successful conservation regime throughout the region.

M. W. Holdgate takes up this theme as he cogently assesses the prospects for regulated development and conservation of Antarctic resources. His central thesis holds that if development of Antarctica should occur, it must proceed in an orderly manner that builds and improves upon achievements already attained under the Antarctic Treaty system. Development must be made compatible with a viable conservation strategy, so that it "sustains the productivity of renewable resources and balances alternative uses, where they compete, in a fashion most beneficial to human welfare" (pp. 128-29). Thus is posed the fundamental query: are environmental regulations contained in the Antarctic Treaty system adequate in coverage and effective in implementation? Dr. Holdgate optimistically concludes that, on balance, they have been. Even so, a more precisely defined and applied conservation strategy is warranted for the Antarctic, especially one that takes into account the impending promulgation of a minerals regime there.

W. M. Bonner's chapter on recent developments in Antarctic conservation neatly complements Holdgate's views. As Dr. Bonner notes, the 1964 Agreed Measures on the Conservation of Antarctic Fauna and Flora do supply a practical code of conduct aimed at environmental protection, albeit admittedly only for the Antarctic land and ice shelves. For the circumpolar waters, the 1972 Seals Convention and the CCAMLR furnish the legally binding conservation ethic. Yet, as Bonner posits, "CCAMLR is a philosophical scientist's convention. It is certainly not a convention for fisheries managers" (p. 145). Monitoring and enforcement of regulations are not institutionally guaranteed. Thus, international environmental organizations such as the International Union of the Conservation of Nature, the Antarctic and Southern Ocean Coalition, and Greenpeace, as well as the Scientific Committee on Antarctic Research, must work to demonstrate the criticality of integrating environmental considerations into Antarctic policymaking.³ In like fashion, the paper by James Barnes calls for adopting new approaches and ecological perspectives to protect the Antarctic environment. Highlights among the environmental objectives advocated by Dr. Barnes include the establishment of an Antarctic Environmental Protection Agency, greater scientific management of Southern Ocean fisheries (especially krill), a long-term moratorium on all minerals activities in the region, widespread acceptance of Antarctica as a world park and creation of an Antarctic fund

³ For an insightful treatment, see Kimball, *The Role of Non-Governmental Organizations in Antarctic Affairs*, in Joyner & Chopra (eds.), *supra* note 2, at 33.

for research aimed at enhancing environmental protection in the area. Implicit in all these suggestions is the necessity of redirecting priorities and changing attitudes. Not surprisingly, it is easier to posit the scientific wisdom and rationality of environmentally sensitive policies than it is to convince 20 individual governments that their national interests are best served by adopting those policies for the benefit of all mankind.

Part IV informatively treats the Antarctic minerals regime as it had emerged up through 1985. At the outset, it is worth inquiring, why negotiations on a minerals regime now? If no minerals of appreciable commercial quantity are known to exist in the Antarctic, why have mineral negotiations been pursued so intensely by the Antarctic Treaty Consultative Parties over the past decade? Alan Watts pinpoints the answer in his contribution. As he astutely observes, considerable political and diplomatic advantage lies in negotiating a regulatory regime without precise knowledge of mineral deposits. Discovery and determination of substantial mineral deposits on, in or around the continent would undoubtedly make negotiations even more difficult, as the vested stakes of states became more sharply focused. Mr. Watts argues convincingly that the creation of a regime now demonstrates an attempt by the ATCPs to resolve problems before they occur, to seize the initiative instead of being relegated to a policy of prescriptive reaction. Watts goes on to address related significant questions: Why does such a regime have to be negotiated? Why should these negotiations be open only to Antarctic Treaty Consultative Parties? What problems have encumbered progress in the negotiations? What solutions appear foreseeable? As Watts intimates, answers to these queries remain inextricably linked to claims of national sovereignty and competing national interests in the Antarctic. Given that an Antarctic Minerals Convention was completed in June 1988, there is no doubt that national interests, sovereign claims and political priorities have been accommodated by the ATCPs through a concerted willingness to compromise and cooperate.

What are the commercial prospects for Antarctic minerals? The pithy conclusion reached by F. G. Larminie should be reassuring to environmentalists: "Virtually nil" (p. 176). How have the minerals negotiations proceeded and what will the new treaty regime look like? In a separate chapter, Dr. Triggs concisely examines the emerging regime's institutional structure, the system likely to be adopted for decision making, the probable means of regulatory enforcement, the role of third-party states and the conceivable distribution of any benefits derived from exploitation activities.

Part V deals with future management and regulation of policies concerning Antarctic affairs. In a succinct essay, John Heap considers the potential for harvesting icebergs for water and mining exploitable minerals in the Antarctic. Irrespective of eventual technological innovations, his conclusion for futuristic resource exploitation in the Antarctic is diplomatically perceptive and politically instructive: international appreciation of the role that territorial sovereignty plays in Antarctic affairs remains critical if resource activity there is to be regulated in a responsible and reasonable way. Given the twin experiences of negotiating the CCAMLR in the late 1970s and the

minerals treaty during the 1980s, ample reason exists to take that warning seriously.

Ambassador Zain-Azraai, former Permanent Representative of Malaysia to the United Nations, takes a different tack from the other contributors. He critically examines the espoused "rights" of the ATCPs based on expertise and experience in the Antarctic, as contrasted with the "rights" of the international community to participate in deciding Antarctic policy priorities in view of all mankind's vested "interests" in the region. In the end, he advocates an "open-minded approach to reconcile the legitimate interests of all parties in the management of Antarctica." The presumption is that such an approach will facilitate resolution of the sovereignty conundrum by establishing a universal regime to manage activities on the continent. Such a noble vision, however, may well outstrip the political practicality and administrative feasibility of a universally directed oversight regime.

Alternative strategies for managing future Antarctic affairs is the subject of J. R. Rowland's piece, and he foresees two general options: (1) the continued evolution of the present Treaty system, and (2) the adoption of new institutional arrangements, the main models for which range from an ATCP-UN trusteeship system, or the negotiation of an entirely new international regime under UN auspices, to the creation of a special UN agency for dealing specifically with Antarctic minerals. As Mr. Rowland suggests, the latter arrangement might defuse the minerals issue. Even so, progress since 1985 in negotiating the ATCP minerals regime plainly indicates that it remained an option beyond realistic consideration by the ATCPs.⁴ By way of conclusion, Triggs cogently summarizes the 1983 and 1984 General Assembly debates on the Question of Antarctica. This assessment prompts her to conclude that the United Nations "can be expected to maintain a watching brief on Antarctic activities and to play a closer role in the negotiations upon a minerals regime" (p. 233). Again, though perhaps the issue is arguable, events since 1985 strongly suggest that subsequent UN debates exerted scant influence upon the progress, process and substance of the minerals negotiations.

There is much to commend in *The Antarctic Treaty regime*. On balance, the presentations are politically objective, lucid and thoughtful. The book admirably achieves its stated purpose, namely, to update "the legal, resource and environmental issues presently [in 1985] under consideration within the Antarctic Treaty system and more recently, by the Secretary-General of the United Nations" (p. xv). This said, it must not be overlooked that Antarctic law and politics have surged on and that some technical information in the volume has been overtaken by subsequent events. This inevitability is evidenced by developments concerning the progressive negotiation of an Antarctic minerals agreement, the emergence of further questions about the political, practical and scientific efficacy of the CCAMLR, and the height-

⁴ For more recent assessments, see F. ORREGO-VICUÑA, ANTARCTIC MINERAL EXPLOITATION (1988); and Joyner, *The Evolving Antarctic Minerals Regime*, 19 OCEAN DEV. & INT'L L. 73 (1988).

ening of widespread international concern over serious depletion of the ozone layer above the continent. Nonetheless, the legal premises in the volume remain substantively intact and relevant, as do the economic, political and environmental realities of the Antarctic situation.

This work embodies much more than the proceedings of a major conference. It supplies valuable insights and important commentary on the evolutionary process of managing Antarctic affairs. A perusal of its contents tells much about where diplomats, government officials and scientists have gone in fashioning Antarctic policy. Even more important for the international lawyer, the contributions also reveal where and why new policies are needed for regulating certain activities in the Antarctic. As a consequence, students, scholars and policymakers alike who are interested in Antarctic law and politics would be well-advised to consult the discerning presentations in this book. Those who do so will be handsomely rewarded for their efforts.

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Internationales Seerecht. By Ingo von Münch. Heidelberg: R. v. Decker's Verlag, G. Schenck, 1985. Pp. v, 288. Index. DM 128.

This book is the 20th volume in a series of legal and social science publications. It attempts to bridge the gap between historical and modern maritime law in light of the Conference on the Law of the Sea (UNCLOS III). *Internationales Seerecht* is written predominantly in German, with two articles translated into English.

Von Münch achieves his goal by laying out the book in three major parts. The first is a detailed introduction to the law of the sea in historical perspective. There follows a series of essays written during UNCLOS III and the period leading up to it. This is done to show the reader the concerns of German international lawyers in the area of the law of the sea. The concluding section is a brief summation of the author's opinion of the results of UNCLOS III.

The introduction is broken up into 21 subsections. The first group examines historical matters relating to shipping. Among these are border problems, attacks on shipping, trade union effects, registration under flags of convenience, environmental concerns and the policing of the oceans. Most of the introduction deals with other uses of the oceans, with an emphasis on the exploitation of the seabeds. Von Münch goes into great detail here because, as later discussed, this seems to be the area of UNCLOS III that stirs up the most controversy.

The author discusses topics such as the effects of the exploitation of the ocean on neighboring countries, exclusive economic zones (EEZs), partitioning the continental shelf, the regulation of seabed exploration, the problems involved in technology transfers and using Antarctica as an international law model. The last subsection of the introduction is a 10-point analysis prepared to assist the West German Government in deciding

whether to accede to the 1982 Convention on the Law of the Sea. This is a pro/con analysis giving the opinions of the German Committee of the International Law Association on the good and bad points of the Convention.

The second part, a collection of articles previously published elsewhere by von Münch, covers a wide range of topics and concerns during the 15-year period leading up to the conclusion of the Convention. The articles show a concern that any agreed-upon international law needs to be flexible to keep up with the changing needs of the world. They also show that while reflagging ships under flags of convenience did offer diplomatic protection to shipping, it did not take into account the needs of the sailors involved, which was the main concern of the maritime trade unions. Other articles discuss topics such as ownership of shipwrecks, the environmental/maritime connection and the problems relating to exploitation of the seabed.

The conclusion gives von Münch's opinions of and reservations about the signing of the Convention on the Law of the Sea. He concludes that some modernization of the international law of the sea is desirable, but he is skeptical as to whether the Convention is the correct approach. He notes that the strongest argument for signing is that this would allow the signatories to participate in the making of the final form of the international law. Von Münch is concerned that countries that agree only with the desire to modify the law (and not agreeing to the form of the then existing modifications) might later be seen as agreeing to a version not actually forming the basis of the agreement. In other words, once a party signs, it would quickly become so enmeshed in the process that disentanglement from a section to which it did not agree would be impossible.

The author further points out that the then existing version of the Convention does not decisively deal with the problem of the transfer of technology. He states that while this package is intended to benefit Third World countries, gaps in the laws could allow developed countries to avoid passing on the benefits of new technology to these countries. Other omissions could require that trade secrets be brought into the public domain. Both of these results are highly undesirable.

The last point that von Münch feels was left unanswered is the possibility that nations could overburden shipping by overregulating their exclusive economic zones. This could happen if a nation imposed high fees on ships passing through its territorial waters. Von Münch goes on to suggest that further refinement could successfully deal with all these problems and that signing at that time would be advisable. On the other hand, he posits that not signing, combined with inaction, could lead to problems more serious than those already existing.

Considering the breadth of this text and the treatment of the subject by others, the contribution of *Internationales Seerecht* lies in its West German perspective and its introductory and concluding sections where von Münch summarizes the salient points of concern in the 1982 Convention.

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Foreign Relations of the United States, 1952-1954. Volume XII: East Asia and the Pacific. Part 1. (Dept. of State Pub. 9390.) Washington: U.S. Govt. Printing Office, 1984. Pp. xiv, 1113. Index.

Foreign Relations of the United States, 1952-1954. Volume XII: East Asia and the Pacific. Part 2. (Dept. of State Pub. 9550.) Washington: U.S. Govt. Printing Office, 1987. Pp. xv, 763. Index.

This volume of the *Foreign Relations* series, which bridges the final year of the Truman administration and the early years of the Eisenhower presidency, coalesces developments in the Far East during the transitional period that links a number of critical diplomatic activities. These include the termination of World War II (with the signing of the Japanese Peace Treaty in September 1951), the end of the Korean War (with the signing of the Armistice in July 1953), the deterioration of the internal and international situation in Indochina (with the crisis at Dien Bien Phu in May 1954), and the Geneva Conference, which produced the cease-fire agreement dividing Vietnam (July 1954). American containment policy in the area is epitomized by the energizing of the ANZUS Pact (September 1951), the signing of the Manila Pact (September 1954), the establishment of the Southeast Asia Treaty Organization, and the framing of a series of bilateral collective defense treaties (signed by the United States with Japan, the Republic of Korea, Nationalist China and the Philippines (1951-1955)).

This anthology of 1,876 pages of records consists of two parts. Part 1 (pp. 1-1,085) focuses on U.S. policies toward the East Asian-Pacific area as a whole, with documents arranged chronologically throughout. Part 2 (pp. 1-748), which deals with American relations with four countries in the area—Burma, Indonesia, the Philippines and Thailand—contains 439 sequentially numbered documents that are arranged chronologically within each of the four segments. Both parts have their own lists of relevant unpublished archival resources, lists of abbreviations, symbols and acronyms, and comprehensive, double-columned indexes. Unlike others in the *Foreign Relations* series, this volume lacks the customary catalog of persons with their full names, official titles, ranks and positions.

Part 1 deals with five major topics. One of these concentrates on general U.S. objectives, policies and actions in the Far East. Another centers on economic aid and development programs. Documentation on these matters concerns unilateral American economic and military assistance arrangements (including action under the Mutual Security Acts of 1953 and 1954), U.S. relations with and the activities of the United Nations Economic Commission for Asia and the Far East (ECAFE) and the Colombo Plan for Cooperative Economic Development in South and Southeast Asia.

The remaining three topics involve defense and security affairs. These embody activities of the ANZUS (Australia, New Zealand and the United States) powers, the five-nation (Australia, France, New Zealand, the United Kingdom and the United States) military consultations to plan for collective action to constrain Communist China's aggression in the area, and the conclusion of the Southeast Asia Collective Defense Treaty and the estab-

ishment of the Southeast Asia Treaty Organization (SEATO). Commentary on the operation of ANZUS embraces planning studies on the development of operational machinery and procedures, and materials on participation in and the deliberations of the ANZUS Council and meetings of member military representatives, and on cooperation of ANZUS with ANZAM (the Australia–New Zealand–Malaya defense arrangement). Records concerned with five-power military consultations pertain to the establishment and functions of an ad hoc committee, a conference of diplomatic representatives that convened in three annual sessions in Washington and Pearl Harbor (1952–1954), and a five-power servicing Staff Agency.

These activities presaged the historic Manila Conference of September 1954, documentation concerning which covers the negotiations of both the preparatory working group and the formal ministerial-level sessions (which convened September 6–8), including verbatim accounts of its six plenary meetings at which the Southeast Asia Collective Defense Treaty, a Protocol to the Treaty and the Pacific Charter were signed by Australia, France, New Zealand, Pakistan, the Philippines, the United Kingdom and the United States (see pp. 852–98).

In addition to presenting materials on general U.S. policy developments and bilateral economic and military assistance arrangements with each of the four countries covered, part 2 furnishes documentation on particularized issues pertaining to each of them. To illustrate, the segment on Burma deals with the problem caused by the presence of Nationalist Chinese (Kuomintang) troops in Burma, their cooperation with the Karen rebellion, the operation of a UN peace observation mission, the evacuation of the Chinese troops and the establishment of an American Military Assistance Advisory Group (MAAG) mission. The segment on Indonesia focuses largely on its dispute with the Netherlands over West Irian/New Guinea, and U.S. efforts to remain neutral in the controversy. In the segment on Thailand, attention is paid to a possible Chinese Communist threat, Thai negotiations with Japan and the probability of establishing U.S. military bases and a joint MAAG mission in the country.

Because of the special relationship of the United States with the Philippine Republic, documentation on this country ranges more widely, from such internal matters as domestic politics and elections, rural development and the insurgency of the Huks, to revision of trade relations (under the bilateral treaty of 1946), implementation of the Mutual Defense Treaty (signed in 1951), the maintenance of U.S. military bases (under the Military Bases Agreement of 1947), and the functioning of the U.S.-Philippines Defense Council and a joint MAAG.

This compendium consists of the customary telegrams, messages, notes and memorandums (of statements “for the record” and summaries of conversations)—together with reports, letters, and other papers and diplomatic communications that flowed primarily within and among the Department of State and other U.S. government agencies in Washington and between the Department and its missions abroad. They also encompass other types of records, such as those relating to the Manila Conference. Those interested

in high-level policymaking and coordination will appreciate the inclusion of information pertaining to the activities of the Joint Chiefs of Staff, the Foreign Operations Administration and the U.S. Information Agency, as well as an ample quantity of National Security Council papers. The latter embrace references to six "National Intelligence Estimates" and four "Special Estimates," more than a dozen NSC "actions," and some 30 references to NSC "documents," most of which concern drafts and refinements of policy statements on "U.S. Policies in the Far East," "U.S. Objectives and Courses of Action With Respect to Communist Aggression in Southeast Asia" and a "Review of U.S. Policy in the Far East." Memorandums of sessions of the National Security Council prepared by members of its Secretariat and documentation on NSC subsidiary agencies—the Planning Board and the Operations Coordinating Board—are also provided.

So far as selectivity, organization, treatment and content are concerned, this anthology characterizes the traditionally superior standards of the Office of the Historian of the Department of State in producing the *Foreign Relations* series, and will be appreciated by all who are interested in the diplomatic relations of the United States in the Far East during the early 1950s. To assist the user, its editors supplement the textual materials with a liberal supply of explanatory, descriptive and cross-referencing editorial commentary and documentary footnotes. As in the past, under the supervision of William Z. Slany (Historian, Department of State) and John P. Glennon (editor in chief), David W. Mabon (editor of part 1), Carl N. Raether and Harriet D. Schwar (editors of part 2) brought to this task their high standards of coping with voluminous, complex and dispersed documentary resources, and distilled them for the public domain in a compact, reliable and readily usable way.

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Exporting the First Amendment: The Press-Government Crusade of 1945–1952.

By Margaret A. Blanchard. New York and London: Longman, 1986.
Pp. xiv, 448. Index. \$39.95.

Exporting the First Amendment, by Margaret Blanchard, is an important, but flawed, book. It is important because of the historical period it covers and the extensive documentation it offers. However, it is essentially flawed because of its lack of analysis and the scant attention paid to some of the most significant issues related to its themes.

It is undeniably to the author's credit that she has chosen to examine one of the most important periods in the recent history of international communications: the post-World War II era. For, as demonstrated during the Iran-contra congressional hearings, it was during this postwar period that U.S. foreign policy built the structure for a world order whose contours are

still operative even as we approach the 1990s. Of particular significance for international communications, it was during the post-World War II period that an intensive American campaign was launched to promote freedom of information throughout the world. This endeavor, backed by the U.S. press and the State Department, is examined in great detail in Professor Blanchard's book.

Given that the American efforts to "export the First Amendment" were pursued primarily within the UN system, one would assume that an in-depth analysis of this period would be especially enlightening with respect to the more recent debates on the New World Information Order. For, as this book itself acknowledges, the UNESCO polemics of the 1970s and 1980s brought into relief the same irreconcilably opposing views on freedom of information that were already in evidence in the early days of the United Nations. However, in spite of the obvious interest of this early historical period, and the abundant firsthand documentation cited, Blanchard has managed to miss the main points of the debate she has so assiduously studied. As background for this assessment, it should be mentioned that the author is by no means the first scholar to examine the postwar free-press crusade of the U.S. Government and newspaper industry. The most well-known writer, who looked at this period over 10 years ago, is Herbert Schiller of the University of California.¹ Schiller's basic thesis is that the postwar promotion of the free flow of information doctrine, and freedom of the press *à l'américaine*, corresponded to the economic and political needs of capitalist expansion. The conceptual contribution of Schiller to international communication debates in the 1970s and 1980s is such that almost every book on the debate over the New World Information Order, for example, cites him.

Therefore, it is troubling that Blanchard does not even cite Schiller's thesis (except in her bibliographic essay at the end of the book), particularly since he was the main pioneer in her own field of study. The reason for this omission is no mystery: the author has simply rejected out of hand his analysis of the press-government campaign of the mid-1940s. In its place, however, she offers very little of substance. This, then, is the main criticism of Blanchard's book: its failure to explain the motivating forces behind the postwar free-press crusade. What the author does offer are numerous statements of press and government officials explaining their cause. But valuable as such statements may be in understanding this period, by themselves they are certainly no substitute for analysis.

There are numerous examples of how the author has simply accepted at face value the rationale offered by the press and government officials for their promotion of the American way. This stance, taken throughout most of the book, is clearly spelled out in the introduction: "In general, the free press crusade was part of a larger effort by American diplomats and business leaders to create a world safe for democracy by remodelling that world in the image of the United States. Although tinged with self-interest, the free-press efforts were basically grounded in noble intentions." These "noble

¹ See H. SCHILLER, *COMMUNICATION AND CULTURAL DOMINATION* (1976).

intentions" are made explicit on numerous occasions. According to Blanchard, the press was primarily concerned with freedom to gather information throughout the world. The State Department had somewhat broader goals: freedom to spread information about the United States around the globe and to promote democracy by free reporting. Its specifically Cold War objectives were slightly modified versions of the above agenda: to fight communism and spread "truthful information" about the United States. A good example of her lack of analysis is to be found precisely in the treatment by Blanchard of the debate over the government information agencies set up after World War II. According to her account, the State Department responded to criticism that it was setting up "government propaganda agencies" by stating that it was only presenting "truthful information." Blanchard lets such an assertion stand, with neither comment nor analysis.

With regard to the press, the book does make brief allusions to the idea that perhaps (but only perhaps) the American private sector also had certain commercial gains in mind through promotion of U.S.-style freedom of the press. For example, readers are summarily informed that even during the days of the League of Nations, American press groups attempted to gain international acceptance for the U.S. Supreme Court decision of 1918 that news had a commercial value. During the UN debates, the commercial interests behind the free-press campaign are also briefly mentioned, but, again, only in passing. In what one can only assume is intended as "an objective rendering of the facts," the author does, for example, make reference to British and Indian criticism of commercial motivations behind the American free-press campaign. But such critiques are followed by neither comment nor analysis.

It is therefore not surprising that toward the end of the book, Blanchard's summary of the goals of the postwar press-government crusade obscures anything but a purely journalistic motivation: "Underlying most of the rhetoric in the international free-press campaign was an effort to protect American correspondents working in foreign countries. Generally, the protection centered on ensuring the individual's right to gather and disseminate information" The incompleteness of such an analysis is evident when one realizes that it does not even answer one of the most important questions raised throughout the book itself: the continuous and unrelenting opposition the U.S. press crusade encountered from both allies and enemies. In fact, explicit rejection of U.S. notions of freedom of information is certainly one of the most important themes stressed throughout *Exporting the First Amendment*. And yet, are we to suppose that countries as diverse as Britain, Mexico, France and India would criticize important aspects of such a "noble" cause if its main concern were, in truth, simply to assist American journalists in gathering and disseminating news? As numerous authors have pointed out in connection with the information debates of the 1970s and 1980s, the stakes of the "free flow" battle are obviously much higher. Past and present opposition to the values of the American First Amendment is based not only on different journalistic philosophies, but also on the impor-

tant connection U.S. critics have established between American information ideology and the objectives of political and economic expansion.

A number of other related issues are also mishandled. Within the context of the freedom of information polemics at the United Nations, the author deals with U.S. objections to proposed international regulations assigning "responsibilities" to the press. As correctly presented in this book, the official U.S. position (which remained unchanged 30 years later at UNESCO) was that asking journalists to do anything except "report the facts" was incompatible with American notions of a free press. What Blanchard virtually ignores in her treatment of this question, however, is the important contribution to this debate made, during the mid-1940s, by the American Hutchins Commission on Freedom of the Press. In fact, the "social responsibility" theory of the press is almost unanimously attributed to the work of this commission. Although this theory was never officially accepted in the United States, it certainly came to the fore in UN discussions and, ironically, was later to be taken up by Third World and socialist countries in the UNESCO debates. Although the book does make reference to other facets of the Hutchins Commission's work, the commission's position on "social responsibility" lies buried in a footnote, which is all the more remarkable since Blanchard herself has written on this question.

Moreover, the author's tendency to accept official pronouncements as gospel truth leads her to the erroneous conclusion that, unlike other countries, this country has rejected press "responsibility" out of hand. In reality, although the "social responsibility" doctrine was never codified in the United States, there is ample evidence—including adjurations to the press by public officials, columns by editors such as William Randolph Hearst and scholarly studies of American newspaper values—that the social responsibility of the press has been and remains to this day one of the most important principles of American journalism.

Another flaw in this book is the absence of any in-depth analysis of First Amendment legislation in the United States. Indeed, one would rightfully expect that a book dealing with the exportation of the First Amendment would have at least given readers some indication of the extremely rich jurists' debates and court decisions relating to this principle. The author is to be faulted for giving no evidence whatsoever that she is even familiar with the long-standing and abundant literature on the First Amendment.

The international legal perspective is also given short shrift. For example, simply pointing out that the Soviet Union has systematically opposed American principles of a free press with notions of national sovereignty and government responsibility does little more than state the obvious. One might actually learn something about foreign news systems, however, if it were pointed out that freedom of the press is actually written into the Soviet Constitution, albeit in a very different form from what Americans are familiar with. Likewise, intellectual awareness is advanced very little by simply pointing out that in the UN debates, French diplomats called for government enforcement of a right of correction. What one would expect from a

scholarly work is some historical, legal explanation of this position based upon references to the pervasive centralization of the French system of governance.

One of the most interesting, but undeveloped, "asides" of the book does, nonetheless, relate to international lawmaking in the field of communications. In the detailed examination of the draft UN Convention on Gathering and International Transmission of News, backed by the State Department and American press groups in the early days of the UN debates, it is stressed that the U.S. Government would, under no circumstances, accept the application of international legislation that might contravene national laws or journalistic principles. The implications of this position are particularly important for progressive legal groups in the United States that have recently supported the UN/UNESCO declarations on the New World Information Order. Part of the reasoning behind this support seems to be that recent legislation designed to curb freedom of information in the name of national security within the United States might be countered by calls for adherence to international norms of open access to information and unlimited freedom of the press.

What clearly emerges in the last—and best—chapter of Blanchard's book is that the U.S. Government has never been bothered by the overt contradictions between its demands for journalistic freedom at the international level and repressive legislation on the national front. Whereas in previous chapters the author adopts a neutral stance on her subject, in this chapter she takes a very convincing, engagé position. For instance, she implicitly condemns the anti-Communist legalistic maneuvers of the Cold War such as Truman's classification program: "American failure to protect communists holding jobs in the communications industry was not an aberration. In fact, Americans never willingly have shared freedom of expression with persons whose beliefs might alter their society" (p. 380). The final chapter also points out that, while certain sectors of the American press condemned these Cold War violations of American journalistic freedoms, no connection whatsoever, in any quarter, was ever made between the hypocrisy of this domestic action and American posturing at the international level. It is not without significance that this same "blind spot" would reappear in the debates of the New World Information Order of the 1970s and 1980s. Newspapers such as the *New York Times* and the *Washington Post* have freely criticized recent government attempts to control and censor information in the United States. Such condemnation, however, has never influenced to the slightest degree these newspapers' portrayal of the New World Information Order debate as a movement pitting American defenders of freedom of the press against Communist and Third World proponents of government-controlled information.

Unfortunately, the merits of this final chapter of *Exporting the First Amendment* do not outweigh its overall deficiencies. In addition to the substantive points raised above, this is a tedious book. The reader is constantly confronted with the inability of the author to synthesize large amounts of

information, the end result being that her few inspired moments lie buried in mountains of verbiage. From an academic viewpoint, there are several lessons to be learned: a doctoral dissertation does not a good book make, and reams of documentation are no substitute for sound analysis. In a larger sense, the lesson of the book is that unless the political and commercial aspects of information are finally understood, history will repeat itself both in the United States and abroad.

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BRIEFER NOTICES

Commercial Arbitration Law in Asia and the Pacific. Edited by Kenneth R. Simmonds, Brian H. W. Hill and Sigvard Jarvin. (Paris: ICC Publishing SA; New York, London, Rome: Oceana Publications, Inc., 1987.) This book takes its place in a series published under the aegis of the International Chamber of Commerce that includes not only *Arbitration Throughout the World*, which dealt largely with arbitration in Western European countries, but also a study of international commercial arbitration by Clive Schmitthoff and one of ICC arbitration by W. Laurence Craig, William W. Park and Jan Paulsson.¹ It gives both summaries of the law on arbitration and texts of relevant statutes of 14 countries in the Far East and the Pacific. The reader now can resort to three different collections of national laws on arbitration for those countries, the rivals being the *International Handbook on Commercial Arbitration*, published by the International Council on Commercial Arbitration, and the Smit-Pechota *World Arbitration Reporter*. The latter two seem less complete but more compact. Users will likely differ as to how much data about a country's rules they will wish to have before they decide to designate it as the situs of possible arbitration or, alternatively, before they decide to consult local counsel about such a choice.

Legitimacy and Force. 2 vols. By Jeane J. Kirkpatrick. *Volume One: Political and Moral Dimensions*. Pp. xxiii, 486. *Volume Two: National and International Dimensions*. Pp. xxiii, 421. (New Brunswick and Oxford: Transaction Books, 1988. \$60/set, cloth; \$30/set, paper.) Whether as professor, think-tank tenant or U.S. ambassador to the United Nations, Dr. Kirkpatrick has played a leading role in formulating the conservative foreign policy pursued by President Reagan. Hence this collection of her more or less occasional, brief pieces is an important historical source even if its multifariousness precludes review or even listing of the many items.

How To Get Your Money in Foreign Countries: A Survey of Court Costs and Lawyer's Fees in 151 Countries. Prepared by Ivo Greiter. (Deventer: Kluwer Law and Taxation Publishers, 1988. Pp. ix, 253. Dfl. 145; £43.50; \$72.50.)

¹ Reviewed at 80 AJIL 268 (1986).

This is a book not about the higher theory of international law but about the gritty realities of international litigation practice. In tabular form, and for each country, it tells the reader whether the loser pays the costs, including attorneys' fees, or whether they remain with each party, how those costs are set and how great those costs are apt to be in collection cases. There is much unclarity and guesswork about the way in which foreign legal systems work¹ and the detailed factual information presented here will be useful for academics as well.

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International Law—General

- The British Year Book of International Law 1985*. Volume 56. Oxford: The Clarendon Press, 1986. Pp. viii, 556. Index. \$116.
- The British Year Book of International Law 1986*. Volume 57. Oxford: The Clarendon Press, 1987. Pp. viii, 671. Index. \$119.
- Cassese, Antonio. *International Law in a Divided World*. Oxford: Clarendon Press, 1986. Pp. xv, 429. Index.
- Conforti, Benedetto. *Diritto Internazionale* (3d ed.). Naples: Editoriale Scientifica, 1987. Pp. xiii, 432. Index. L. 35,000.
- Delbrück, Jost, Wilhelm A. Kewenig and Rüdiger Wolfrum (eds.). *German Yearbook of International Law*. Volume 29, 1986. Berlin: Duncker & Humblot, 1987. Pp. 612. DM 212.
- South African Yearbook of International Law*. Volume 12, 1986–1987. Pretoria: VerLoren van Themaat Centre for International Law, University of South Africa. Pp. 319. Index. R25; \$25.

International Economic Law & Relations

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- Mowery, David C. (ed.). *International Collaborative Ventures in U.S. Manufacturing*. Cambridge: Ballinger Publishing Company, 1988. Published with the American Enterprise Institute. Pp. xiv, 386. Index. \$34.95.
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- Simmonds, Kenneth R., and Brian H. W. Hill (comps./eds.). *Law and Practice under the GATT*. New York, London, Rome: Oceana Publications, Inc., 1988. 1 binder. \$100.

¹ Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

* Mention here neither assures nor precludes later review.

Trade Policies for a Better Future: The 'Leutwiler Report', the GATT and the Uruguay Round. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1987. Pp. vii, 174. Dfl.105; \$52.50; £32.

van Dijk, Pieter, Fried van Hoof, Albert Koers and Kamiel Mortelmans (eds.). *Restructuring the International Economic Order: The Role of Law and Lawyers.* Proceedings of the Colloquium, organized by the Department of International and Economic Law on June 12 and 13, 1986 on the occasion of the 350th anniversary of the University of Utrecht. Published in co-operation with the Netherlands Institute for Social and Economic Legal Research. Deventer: Kluwer Law and Taxation Publishers, 1987. Pp. viii, 270. Dfl.125; £43; \$61.

Wallace, Cynthia Day (ed.). *Foreign Direct Investment and the Multinational Enterprise: A Bibliography.* Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1988. Pp. xi, 355. Dfl.195; \$100; £59.

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(The following abbreviations refer to sections of the *Journal*: *Ag.*, Agora; *BN*, Briefer Notices; *BR*, Book Reviews and Notes; *CD*, Current Developments; *Corr.*, Correspondence; *CP*, Contemporary Practice of the US Relating to International Law; *Ed.*, Editorial Comments; *ID*, International Decisions; *JD*, Judicial Decisions; *LA*, Leading Article; *NC*, Notes and Comments. Other abbreviations include: *AJIL*, *American Journal of International Law*; *ASIL*, American Society of International Law; *FRG*, Federal Republic of Germany; *FSIA*, US Foreign Sovereign Immunities Act; *ICJ*, International Court of Justice; *ICSID*, International Centre for Settlement of Investment Disputes; *ILC*, International Law Commission; *IMO*, International Maritime Organization; *INF Treaty*, Treaty on the Elimination of Intermediate-Range and Shorter-Range Missiles; *INS*, Immigration and Naturalization Service; *LOS*, law of the sea; *MARPOL*, International Convention for the Prevention of Pollution from Ships; *PLO*, Palestine Liberation Organization; *UK*, United Kingdom; *UN*, United Nations; *UNGA*, United Nations General Assembly; *UNSC*, United Nations Security Council; *US*, United States; *USSR*, Union of Soviet Socialist Republics.)

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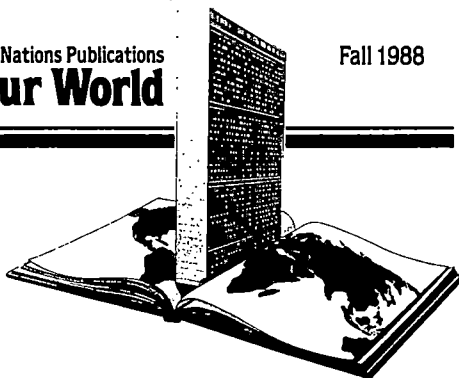
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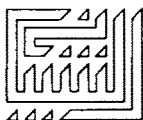
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